No.

82-1391

IN THE

Supreme Court of the United States

October Term, 1982

HERBERT SPERLING,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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QUESTIONS PRESENTED

1) Where the indictment and the trial court instructions have specifically required the jury to find the defendant guilty of specified substantive counts before it could find him guilty of a §848 violation; where the jury has convicted on the substantive and §848 counts; where the Court of Appeals has then reversed the substantive counts because of a Jencks Act violation; can the §848 conviction still stand?

2) Where the District Court judge and a majority of the Court of Appeals have -- either deliberately or indadvertently -- failed to address the issues clearly raised by petitioner and have instead addressed and answered other,

far easier, issues that were not raised, has petitioner been denied due process?

3) Where petitioner alleges that the District Court judge who decided that case was heard bragging by a distinguished member of the bar that he had initiated ex parte communication with the United States Attorney about how to handle the petition, and had made specific tactical suggestions about handling the petition, was it appropriate to deny a hearing on these allegations?

4) Where a member of the majority of the panel of the Court of Appeals -- in his separate opinion -- has relied on a sentence from a secret memorandum which he purports to have sent to a member of a previous panel and which he claims "prompted" the recipient to decide an important issue in the case in a certain manner, was it proper for the Court of Appeals to deny petitioner's request for full disclosure of the memorandum "so that he could make an independent determination of the accuracy of Judge Van Graafeland's representation"?

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TABLE OF AUTHORITIES

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Second Circuit, dated October 22, 1982, and the opinion of the United States District Court for the Southern District of New York, dated January 22, 1982, are reprinted in the Appendix. The Court of Appeals' decision is reported at 692 F.2d 223 (2d Cir. 1982); the District Court's opinion is reported at 530 F. Supp. 672 (S.D.N.Y. 1982).

Previous opinions: United States v. Sperling, 506 F.2d 1323 (2d Cir. 1974) ("Sperling I"), cert. denied, 420 U.S. 962 (1975); United States v. Sperling, 560 F.2d 1050 (2d Cir. 1977) ("Sperling II"); United States v. Sperling, 595 F.2d 1209 (2d Cir.) ("Sperling III"), cert. denied, 441 U.S. 947 (1979).

JURISDICTION

a) The judgment of conviction was rendered on July 12, 1973.

b) The order and judgment of the United States District Court is dated January 22, 1982. The order of affirmance of the United States Court of Appeals is dated October 22, 1982. The order and judgment denying rehearing is dated December 20, 1982.

c) Jurisdiction to review the judgment by certiorari is conferred under 28 U.S.C. § 1254.

STATEMENT OF THE CASE

Petitioner Herbert Sperling is presently incarcerated for life without possibility of parole, having been convicted of violating 21 U.S.C. § 848 (engaging in a continuing criminal interprise). In May 1973, a twelve-count grand jury indictment was filed in the United States District Court for the Southern District of New York. Count Two of the indictment alleged that Petitioner engaged in a continuing criminal enterprise in violation of 21 U.S.C. § 848. As a specific element of the § 848 charge, the indictment incorporated the underlying predicate felonies alleged

in Counts Eight, Nine and Ten.*

A jury trial in the United States Distric Court for the Southern District of New York, Judge Milton Pollack presiding, commenced on June 18, 1973. Judge Pollack instructed the jury that proof beyond a reasonable doubt of the underlying felonies charged in Counts Eight, Nine and Ten was a necessary element of the § 848 offense charged in Count Two. The jury found Petitioner Sperling guilty on all counts in which he was named. In September 1973, on Count Two, alone, Judge Pollack sentenced Petitioneer to life imprisonment without possibility of parole and a $100,000 fine. (Petitioner received lesser penalties for

* Petitioner's conviction on Count One, the conspiracy charge, was vacated since it was a lesser included offense of the Count Two § 848 continuing criminal enterprise violation and imposition of concurrent sentences violated the Fifth Amendment's double jeopardy clause. United States v. Sperling, 560 F.2d 1050, 1059-60 (2d Cir. 1977).

the other Counts which have since been dismissed or remanded.)

On appeal, the United States Court of Appeals for the Second Circuit reversed Petitioner's convictions on the underlying substantitve felonies charged in Counts Eight, Nine and Ten. United States v. Sperling, 506 F.2d 1323 (2d Cir. 1974), cert. denied, 420 U.S. 962 (1975). The reversals were based on the Government's failure to disclose a letter written by Barry Lipsky, the principal government witness on these three counts. As a result of this Jencks Act violation, 18 U.S.C. § 3500, there was no creditable evidence to support Petitioner's conviction on the predicate felonies. 506 F.2d at 1331.

Despite the reversal of the convictions on the substantive counts which had been a prerequisite for the finding of guilt under § 848, the Court did not overturn the § 848 conviction. Instead, the

Court postulated a wholly different basis to support a finding of guilt on the § 848 count -- "more than sufficient" evidence of Petitioner Sperling's involvement in narcotics transactions other than those described in Counts Eight, Nine and Ten.

On July 10, 1978, Petitioner Sperling filed a petition, pursuant to 28 U.S.C. § 2255, to vacate his conviction and sentence. He alleged that his § 848 sentence was unconstitutionally imposed since the prosecution failed to prove all the elements of a § 848 offense and because the appellate court affirmed his conviction on grounds never raised by the prosecution, nor passed upon by the jury. District Judge Pollack held that the petition raised "non-constitutional issues at best." United States v. Sperling, Memorandum Opinion, August 31, 1978. The United States Court of Appeals for the Second Circuit affirmed and the Supreme Court

denied both a petition for certiorari and a petition for rehearing, none of these dispositions being on the merits. United States v. Sperling, 595 F.2d (2d Cir. 1979) ("Sperling III"), cert. denied, 441 U.S. 947 (1979).

Petitioners' current § 2255 motion, upon which this petition is based, was again rejected by Judge Milton Pollack, Memorandum Opinion, January 22, 1982, and by a divided panel of the United States Court of Appeals for the Second Circuit. Opinion, October 22, 1982.

BASIS FOR FEDERAL COURT JURISDICTION IN COURT OF FIRST INSTANCE

The district court had jurisdiction by virtue of 28 U.S.C. § 2255.

REASONS FOR GRANTING THE WRIT

I. INTRODUCTION

This case -- involving a sharply divided Court of Appeals* -- raises compelling issues going to the integrity of the judicial system. It raises unanswered questions of judicial impropriety involving ex parte communications betweeen a district judge of the United States Court of Appeals for the Southern District of New York. Most importantly, it centers on a defendant who has already served nine years in prison and who will spend the rest of his life in prison for a crime of which he does not stand properly convicted. The case -- raising the most fundamental constitutional issues -- calls for the supervision of this Court and of the Solicitor General's Office.

* The panel's decision included a lengthy and stinging dissenting opinion by Judge Kearse. Three judges, including the Chief Judge, voted for rehearing en banc.

Petitioner has repeatedly sought to have a court understand and reply to his simple and straightforward allegations. No court has done so. Finally, after years of frustrating litigation, during which the District Judge Milton Pollack has misstated and deflected his contentions - for possible reasons which raise the gravest questions of judicial integrity -- and during which the Court of Appeals has simply followed Judge Pollack's path, one judge of the Court of Appeals has finally taken Petitioner's claims seriously. Accordingly, instead of simply repeating these claims in his own words, Petitioner, in addition to briefly setting out his contentions in the body of this petition, incorporates Judge Kearse's opinion as his argument to this Court. He respectfully urges this Court (and the Solicitor General's Office) to read that opinion, along with the others.

Unless the Solicitor General's Office and the Justices of this Court can justify -- really justify, not just write the necessary words -- how petitioner's § 848 conviction can still stand in the face of the reversals of the underlying substantive counts, then justice and simple intellectual honesty demand that the Solicitor General and this Court acknowledge that it is power alone -- and not law or justice -- that is keeping the petitioner in prison.

Neither the majority nor the concurring opinion of the panel of the Court of Appeals responds to any of the issues raised by petitioner. They simply offer verbal constructs which paper over petitioner's real and unanswerable claims. There is nothing more frustrating to honest lawyers, or more destructive of the respect

and integrity of the judicial system, than to read judicial opinions which -- inadvertently or deliberately -- sidestep the issue raised and address straw-persons. It is for that reason that the tone of this petition is somewhat challenging. It is, with all due respect, a respectful challenge to the Solicitor General's Office and to this Honorable Court to take seriously -- and respond to -- the real claims that petitioner has been seeking, with frustrating results, to present to the courts over the past five years. He is confident that in light of Judge Kearse's unanswerable arguments, the Solicitor General and this Honorable Court will consider <u>those</u> issues, and not the straw issues addresed by Judge Pollack, Judge Timbers, and Judge van Graafeiland.

II. PETITIONER'S § 848 CONVICTION CANNOT STAND AFTER THE REVERSAL OF THE UNDERLYING SUBSTANTIVE COUNTS

Petitioner -- who is confined for life without possibility of parole for a §848 conviction -- has twice sought to raise a simple and straightforward constitutional challenge to his conviction. The issue -- in a nutshell -- is this: where the indictment and the trial court instructions have specifically required the jury to find the defendant guilty of specified substantive counts before it could find him guilty of a §848 violation; where the jury has convicted on the substantive and §848 counts; and where the Court of Appeals has then reversed the substantive counts because of a Jencks Act violation; can the §848 conviction still stand?

Despite the simple and straightforward nature of this issue, District Judge Pollack has twice -- to put it most generously -- "misperceived the gist of

the prisoner's ground" and responded to arguments that "were not the [claims] on which Sperling relied." Slip op. at 5401, 5402 (Kearse, J., dissenting). After the oral argument on this appeal, counsel for petitioner received information concerning ex parte communications which -- if true -- strongly suggests that Judge Pollack's misperception of petitioner's claims may not have been inadvertent.

The way in which this case has been "handled" from the very beginning -- distortion of the issues, apparent ex parte communications, refusal by the Court of Appeals to confront the real issues -- raises serious questions about the integrity of the judicial process. Judge Kearse's detailed opinion examines Judge Pollack's misperception of the issues and the Court of Appeals' errors in refusing to reverse Judge Pollack's orders. Petitioner relied on Judge Kearse's dissent in his

petition for rehearing en banc, which garnered the votes of three Circuit Judges. He continues to rely on Judge Kearse's opinion in the instant petition for certiorari. Petitioner urges this Court to read the opinions before deciding whether to grant the petition.

Judge Kearse's dissenting opinion succinctly states the relevant facts and the issues.

> Sperling was convicted ... of engaging in a continuing criminal enterprise, in violation of 21 U.S.C. §848 (1976) (count 2); and of possessing heroin and cocaine with intent to distribute it, in violation of 21 U.S.C. §§841(a)(1) and (b)(1)(A) (1976) (counts 8, 9, and 10). As to count 2, the jury had been instructed that in order to find Sperling guilty of a continuing criminal enterprise under §848, it must first find him guilty under counts 8, 9 and 10 of the indictment.
>
> On appeal by Sperling and his codefendants, this Court reversed the convictions on counts 8, 9 and 10 on the ground that the government had failed to disclose, pursuant to the Jencks Act, 18 U.S.C. §3500 (1976), a letter that might have

been used to impeach the government's key witness, Barry Lipsky. United States v. Sperling, 506 F.2d 1323, 1332-35 (2d Cir. 1974) ("Sperling I"), cert. denied, 420 U.S. 962 (1975). We ruled that without the Lipsky testimony the evidence was insufficient for the jury to find Sperling or his codefendants guilty on counts 8, 9, and 10. Id. at 1335. We therefore remanded these counts for a new trial, with the Jencks Act material disclosed. We upheld Sperling's conviction on count 2, however, stating that

> . . .Sperling's conviction of engaging in a continuing criminal enterprise involving hard narcotics was based on evidence wholly independent of Lipsky's testimony.

Id.

Sperling's claim on his §2255 application is that because the jury had been instructed that it must find him guilty on counts 8-10 in order to convict him on count 2, our setting aside the verdicts on counts 8-10 eliminated the mandated predicate for the jury's verdict of guilty on count 2. He claims that we denied him due process by looking to evidence of acts other than those charged in counts 8-10 as support for the conviction under count 2, because we thereby sustained his conviction on the basis of facts different from those on which the jury had been instructed to rest its

verdict on count 2.

Slip op. at 5389-90 (Kearse, J., dissenting) (footnote and citation omitted).

Notwithstanding the simplicity of the constitutional claim, four separate courts -- District Judge Pollock on two occasions and panels of the Court of Appeals on two occasions -- have chosen,

either deliberately 1/ or inadvertently,

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1 Petitioner's counsel had received information raising serious questions concerning the propriety of Judge Pollack's conduct in handling petitioner's second application. This information was summarized in the following telegram sent on June 4, 1982, to the panel of the Court of Appeals that considered the instant appeal:

> At 8 AM this morning I received a call from a member of the bar who informed me that last night he was in the presence of Judge Milton Pollack -- the District Judge in the Sperling case -- and heard Judge Pollack bragging about how he had handled my petition on the Sperling case. Judge Pollack said that he had spoken to John Martin, the United States Attorney, and advised him how to deal with my petition so that he could dismiss it. During this exparte conversation, Judge Pollack made specific suggestions about the legal responses and tactics the government should use and the personnel who should implement these tactics.
>
> Needless to say, this kind of exparte communication between the Judge and the prosecutor is absolutely improper and illegal. It was extremely prejudicial to my client's right to a fair hearing by an unbiased judge, and it strongly suggests that Judge Pollack has been biased against my client throoughout this litigation. The case is now on appeal. In the event this Court has decided to reverse the conviction no harm has been done to my client. But in

to ignore or distort the issue presented by petitioner.

Judge Kearse detailed, in her dissent, the deficiencies in each of the

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the event it may affirm, then I hereby request an evidentiary hearing, before a different Judge, at which I can examine both Judge Pollack and Mr. Martin under oath to establish the exact nature and content of the discussions. There were other witnesses to last night's statements by Judge Pollack. If these statements are denied, I would call them as well.

Because of the extremely serious nature of this situation, it might be advisable to have the hearing -- if necessary -- before a judge who has no personal association with either Judge Pollack or Mr. Martin. If the Court finds it necessary I will attest to the above in a sworn affidavit, but I felt it imperative to get this information before the Court as soon as it came to my attention. Respectfully submitted.

Judge Timbers blandly asserts that it is unnecessary and inappropriate to comment on these charges. "We decide the case on the record before us." Slip op. at 5384, n.3.

Despite this assertion the majority relied heavily upon Judge Pollack's opinion which, if the above allegations are true, is tainted. Indeed, since Judge Pollack denied petitioner an evidentiary hearing, the most significant aspect of the "record" is Judge Pollack's opinion.

prior judicial responses to petitioner's claims. Thus, for example, she recognized that Judge Pollack's characterization of the first §2255 application as raising "non-constitutional errors at best" occurred because Judge Pollack failed to consider an essential ingredient of petitioner's claim: that the Court of Appeals had affirmed the count 2 conviction on the basis of acts other than those charged in counts 8-10.

> "[T]he district court seemed to assume that Sperling I affirmed the count 2 conviction in reliance on the Lipsky testimony evidence on Counts 8-10. Proceeding on this assumption, the Court construed Sperling's claim as (a) a simple attack on the sufficiency of the evidence to support a conviction on count 2, and (b) a Jencks Act claim that the Lipsky evidence should not have been considered on count 2."

Slip op. at 5400 (Kearse, J., dissenting). The Court of Appeals summarily affirmed.

Ruling on the instant petition,

Judge Pollack once again rejected petitioner's claim, and the Court of Appeals affirmed. Adopting Judge Pollack's erroneous assumption and despite its own clear language in Sperling I, the Court of Appeals insisted that it had affirmed the §848 conviction not on evidence other than that in support of the substantive counts, but precisely on the evidence presented in support of those counts (i.e., the Lipsky testimony).

The court's theory, while difficult to comprehend, is apparently either that the Jencks Act rendered the Lipsky testimony inadmissible on the substantive counts but admissible on the § 848 count; or that, while the Lipsky testimony was equally inadmissible on the § 848 count, its admission was mere statutory error, not of constitutional magnitude, and thus not subject to attack under § 2255.

Judge Kearse is clearly correct in

her determination that the affirmance in Sperling I was based on evidence other than that presented in support of the substantive counts and therefore violated Sperling's constitutional right to due process.

But even if the majority's premise were sound -- that the Sperling I affirmmance of the § 848 count rested on the Lipsky testimony -- his conviction is still infirm. There is simply no basis in law or in logic for the proposition that Lipsky's testimony was competent for purposes of the §848 count but incompetent for purposes of the substantive counts. 2/ The Jencks Act surely does not recognize such a

2. Without further explanation, the Court merely asserts that "Although the Jencks Act required that the testimony not be considered in ruling on the validity of the substantive offenses, it did not require that it be ignored with respect to the § 858 count." Slip op. at 5384. Petitioner respectfully requests the Solicitor General's office to address this unprecedented and illogical distinction.

distinction. Nor do the substantive or § 848 statutes. Moreover, the court's theories <u>still</u> fail to address petitioner's contention: that the charge to the jury required that the jury find defendant guilty of the substantive counts before it could convict on the § 848 count, and, absent convictions on those counts the §848

conviction cannot stand. 3/

In short, Judge Timbers' opinion and Judge Van Graafeiland's concurrence are

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3 The majority argues that there was "sufficient evidence to support the § 848 conviction even without the substantive counts." Slip op. at 5382. As petitioner argued in all of his briefs and at oral argument -- literally ad nauseam -- this is not his contention. His contention is that the indictment, the prosecution's case, and the jury instruction all required the jury to find the defendant guilty of the substantive counts as a condition precedent to convicting him of the § 848 count.

The majority also appears to argue that, if the convictions on the substantive counts had been reversed on constitutional grounds, "a new trial would have been barred on double jeopardy grounds." Slip op. at 5383. No authority is cited for this proposition, and we are aware of none. When a conviction is reversed on Brady grounds -- a constitutional violation -- there is no double jeoipardy barier to retrial. There is indeed no relationship between double jeopardy and whether the ground for reversal was constitutional or statutory. Again petitioner respectfullly requests the Solicitor General's office to address this argument.

simply wrong.4/ As Judge Kearse points out, petitioner has not taken inconsistent positions. See Slip op. at 5403, n.11 (Kearse, J., dissenting).

Petitioner agrees with the majority of the panel that "there must be an end to the instant litigation at some point." Petitioner -- who is serving a sentence of life imprisonment with no possibility of

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4 In support of his erroneous contention of inconsistency, Judge Van Graafeiland quotes selectively from a confidential memorandum that he sent to Judge Waterman on June 3, 1977, and claims that it was "that memo which prompted Judge Waterman to provide for reinstatement of the conspiracy sentence in the 'unlikely event' that Sperling's conviction on the continuing criminal enterprise count should be vacated." Slip op. at 5387, n.1 (Van Graafeiland, J., concurring). Petitioner respectfully requested full disclosure of the memorandum and any responses so that he can make an independent determination of the accuracy of Judge Van Graafeiland's representation. It would be unfair in the extreme to allow a judge to quote selectively from an internal memorandum without permitting counsel to inspect the entire memorandum and the responses. His request was ignored below and Petitioner respectfully raises it again in this petition.

parole -- has done everything in his power to present his important constitutional issue in the clearest and most straightforward manner. It has been Judge Pollack and the majority judges of the two appellate panels who have kept this litigiation going by distorting and ignoring petitioner's claims.

This litigation will not end until a federal court responds to petitioner's actual contentions. This Honorable Court can put an end to this litigation by addressing those claims. But no court, under our system of government, can order an end to litigation by repeatedly refusing to address important constitutional issues and by concocting erroneous post hoc rationalizations to hide error. It is precisely the office of the writ of habeas corpus to assure that so long as a petitioner remains confined on the basis of an unconstitutional conviction, and so long as

the courts have not definitely ruled against the constitutional challenges he has presented, that the petitioner must remain free to persist in his challenge. And this petitioner will persist unless and until a court addresses it and resolves it. It would be a mockery of the legitimate considerations of finality to deny petitioner a hearing on the ground that twice previously the Courts have erroneously refused to consider the constitutional issues he has sought to raise.5/

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5 Any doubts about the power of the courts to grant collateral relief on this second petition for a writ of habeas corpus are resolved by Judge Kearse's reliance -- in her opinion -- on a case decided by this Court subsequent to the filing and disposition of the first petition.

> The majority's palliative for this fundamental defect is to state that the trial court's instructions to the jury with respect to count 2 were more favorable to Sperling than was required by law. Whether or not the premise is correct, it cannot alter the instructions given, and in light of those instructions we were not entitled to affirm on the basis of acts not charged in counts 8-10, for it is

As Judge Kearse notes, the gravamen of petitioner's claim is that he was denied

established that a defendant has a due process right to have an affirmance of his conviction based strictly on a consideration of the premises on which the jury was instructed to base its verdict. Dunn v. United States, 442 U.S. 100 (1979).

In Dunn, the defendant had been charged with making inconsistent statements in grand jury proceedings or proceedings ancillary thereto, in violation of 18 U.S.C. § 1623 (1976). The government introduced evidence that Dunn had given testimony before the grand jury, that he thereafter, in September 1976, made a statement inconsistent with his grand jury testimony, and that in October, 1976 he gave testimony reiterating his September statement. The indictment charged that Dunn's grand jury testimony was inconsistent with his September statement, and the case was submitted to the jury on this theory. 442 U.S. at 106 & n.4. On appeal from the conviction, the court of appeals ruled that the September statement should not have been considered since it was not made in an "ancillary" proceeding, but that as the October statement had been made in such a proceeding, the conviction would be upheld. In an 8-0 decision, the Supreme court reversed, stating that

> while there was no variance between the indictment and the proof at trial, there was a discrepancy between the basis on which the

his constitutional rights by the original action of a panel of the Court of Appeals

> jury rendered its verdict and that on which the Court of Appeals sustained petitiner's conviction. Whereas the jury was instructed to rest its decision on Dunn's September statement, the Tenth Circuit predicated its affirmance on petitioner's October testimony. The Government concedes that this ruling was erroneous.
>
> ...We agree.
>
> To uphold a conviction on a charge that was neither alleged in an indictment nor presented to a jury at trial offends the most basic notions of due process. Few constitutional principles are more firmly established than a defendant's right to be heard on the specific charges of which he is accused. See Eaton v. Tulsa, 415 U.S. 697, 698-699 (1974) (per curiam); Garner v. Louisiana, 368 U.S. 1576, 163-164 (1961); Cole v. Arkansas, 333 U.S. 196, 201 (1948): De Jonge v. Oregon, 299 U.S. 353, 362 (1937). There is, to be sure, no glaring distinction between the Government's theory at trial and the Tenth Circuit's analysis on appeal. The jury might well have reached the same verdict had the prosecution built its case on petitioner's October 21 testimony adopting his September 30 statement rather than on the September statement itself. But the offense was not so defined, and appellate courts are

-- rather than by the district court. It was a panel of the Court of Appeals which reversed the convictions on the underlying

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not free to revise the basis on which a defendant is convicted simply because the same result would likely obtain on retrial.

Id. at 106-07 (emphasis added).

The principle of Dunn is no less applicable to Sperling. Count 2, see note 5 supra, charged Sperling with having violated § 848 "in that he" engaged in the specific acts alleged in counts 8, 9, and 10, which were incorporated by reference in count 2; these were alleged to be part of a continuing series of violations, none of which was even minimally detailed. Consistent with count 2, the trial court's charge instructed the jury that it must find Sperling guilty of counts 8, 9, and 10 in order to convict him on count 2. I find the parallel between this case and Dunn inescapable. Notwithstanding the ruling in United States v. Sisca, 503 F.2d 1337, 1345-46 (2d Cir.), cert. denied, 419 U.S. 10008 (1974), that a defendant may be convicted under § 848 even if no substantive offenses have been alleged as separate counts of the indictment, Dunn holds that due process does not permit the appelate court to substitute uncharged offenses for the charged violations that cannot be sustained. Thus, when the jury has been instructed that it may conclude "A" only if it has found

substantive crimes while upholding the § 848 conviction. Since there is some question whether a district court or a panel of the Court of Appeals may appropriately overrule another panel, it is highly appropriate that this issue be considered by this Honorable Court. This is especially so since serious allegations of judicial impropriety remain unanswered in this case.

> "B," we simply may not affirm on the supposition that the outcome would have been the same if the jury had been told that it could conclude "A" if it had found "C."
>
> In sum, I disagree with the majority's view of the merits of Sperling's claim. As I read Sperling I, Sperling's contention that his Count 2 conviction was affirmed on the basis of facts other than those on which the jury had been instructe to render its verdict is factually correct. And his contention that such an affirmance denied him due process is legally sound.

United States v. Sperling, supra, Slip. op. at 5394-93 (Kearse, J., dissenting) (footnote omitted).

CONCLUSION

This is a case which cries out urgently for review by this Court. Petitioner, who has been sentenced to prison for the rest of his life -- has been denied the most elementary justice. Only Judge Kearse has considered and responded to the important constitutional issue he has tried to raise. And, as she has concluded, there is no basis on which petitioner's § 848 conviction can now stand. Despite Judge Kearse's unanswered analysis petitioner must remain imprisoned for the remainder of his life unless this Court is willing to grant him relief.

For all these reasons, petitioner respectfully prays that this Court grant his petition or other relief which will finally resolve the issue that he has

repeatedly tried to present.

Respectfully submitted,

Alan M. Dershowitz
Nathan Z. Dershowitz

Attorneys for Herbert Sperling

February 17, 1983

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

At a stated term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse, in the City of New York, on the twentieth day of December, one thousand nine hundred and eighty-two.

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HERBERT SPERLING,

Petitioner-Appellant,

No. 82-2022

v.

UNITED STATES OF AMERICA,

Respondent-Appellee.

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A petition for rehearing containing

a suggestion that the action be reheard in banc having been filed herein by counsel for the petitioner-appellant, Herbert Sperling,

Upon consideration by the panel that heard the appeal, it is

ORDERED that said petition for rehearing is DENIED, Judge Kearse dissenting.

It is further noted that a poll of the judges in regular active service having been taken on the suggestion for rehearing in banc and there being no majority in favor thereof, rehearing in banc is DENIED, Chief Judge Feinberg and Judges Oakes and Kearse, dissenting.

A. Daniel Fusaro, Clerk
by
/s/
Francis X. Gindhart
Chief Deputy Clerk

[CORRECTED COPY]

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 1042—August Term, 1981

(Argued May 21, 1982 Decided October 22, 1982)

Docket No. 82-2022

HERBERT SPERLING,

Petitioner-Appellant,

—v.—

UNITED STATES OF AMERICA,

Respondent-Appellee.

Before:

TIMBERS, VAN GRAAFEILAND and KEARSE,

Circuit Judges.

Appeal from an order denying appellant's second petition pursuant to 28 U.S.C. § 2255 (1976), Milton Pollack, *District Judge*, claiming on the identical grounds asserted in his first petition that his conviction for engaging in a

continuing criminal enterprise as charged under 21 U.S.C. § 848 (1976) should be vacated.

Affirmed.

GERARD E. LYNCH, Asst. U.S. Atty., New York, N.Y. (John S. Martin, Jr., U.S. Atty., and Kate Stith Pressman, Asst. U.S. Atty., New York, N.Y., on the brief), *for respondent-appellee.*

ALAN M. DERSHOWITZ, Cambridge, Mass. (Nathan Z. Dershowitz and Mark D. Fabriani, New York, N.Y., on the brief), *for petitioner-appellant.*

TIMBERS, *Circuit Judge*:

For the third time appellant Sperling (hereinafter, "appellant") asks us to consider alleged errors in his 1973 conviction for engaging in a continuing criminal enterprise in violation of 21 U.S.C. § 848 (1976). This is the second time appellant has appealed to this Court from the denial of his petitions pursuant to 28 U.S.C. § 2255 (1976), in both instances raising identical claims. We find his claims no more persuasive now than before. We affirm.

I.

Appellant and seventeen others were indicted on May 11, 1973 on various counts charging violations of the

federal narcotics laws. Count I charged appellant with conspiracy to violate the narcotics laws. 21 U.S.C. § 846 (1976). Count II charged him with engaging in a continuing criminal enterprise in violation of 21 U.S.C. § 848 (1976). Counts VIII, IX, and X charged him with possessing heroin and cocaine with intent to distribute it in violation of 21 U.S.C. §§ 841(a)(1) and (b)(1)(A) (1976). On July 12, 1973, after a four week jury trial, Milton Pollack, *District Judge*, appellant was convicted on all counts upon which he was charged. On September 12, 1973, Judge Pollack sentenced appellant to life imprisonment on Count II, 30 years on Counts I, VIII, IX and X (concurrent), 6 years special parole, $100,000 fine on Count II, and $200,000 fine on all other counts.

On their direct appeals to this Court, appellant and his codefendants claimed, inter alia, that the government failed to comply with the Jencks Act, 18 U.S.C. § 3500 (1976), in that it failed to provide them with a letter written by witness Barry Lipsky which might have had an impact on his credibility. As to this claim, we agreed and reversed the convictions on the substantive counts (Counts VIII, IX, and X), holding that there was insufficient evidence other than Lipsky's testimony to sustain the convictions on those counts. *United States* v. *Sperling*, 506 F.2d 1323, 1335 (2 Cir. 1974) ("*Sperling I*"), *cert. denied*, 420 U.S. 962 (1975). We remanded the case for a new trial on those counts.

In *Sperling I*, we affirmed appellant's convictions on the conspiracy count (Count I) and on the continuing criminal enterprise count (Count II), holding that appellant's convictions on those counts were not affected by the absence of the Lipsky letter. 506 F.2d at 1335-37 and 1337 n.18. With respect to the conspiracy count, we held:

"In short, we are left with the firm conviction that, in view of the substantial, independent and corroborating evidence linking the Pacelli and Sperling narcotics operations, the availability of the Lipsky-Feffer letter for use on cross-examination of Lipsky would not have had any effect on the jury's verdict with respect to the conspiracy convictions of Sperling, Goldstein and Schworak, including their participation in the Pacelli-Sperling conspiracy." *Id.* at 1337 (footnotes omitted).

With respect to the continuing criminal enterprise count, we held:

"Moreover, Sperling's conviction of engaging in a continuing criminal enterprise involving hard narcotics was based on evidence wholly independent of Lipsky's testimony." *Id.* at 1335.

We also held, with respect to the continuing criminal enterprise count, that the "evidence was more than sufficient to sustain his conviction under this count." *Id.* at 1344 (footnote omitted). We remanded the case to the district court for resentencing on Count I, since that sentence had been made concurrent with the sentences on the reversed substantive counts. The Supreme Court denied certiorari. 420 U.S. 962 (1975).

On remand, the district court on May 17, 1976 resentenced appellant on Count I to 30 years imprisonment and a $50,000 fine, the sentence on Count I to run concurrently with the life sentence and $100,000 fine previously imposed on Count II. 413 F.Supp. 845. On appeal from that judgment, we vacated the sentence imposed on Count I on the ground that the conspiracy count was a lesser included offense in the continuing criminal enterprise charge. We held, however, that "in the

unlikely event that sometime in the future his conviction on Count Two shall be overturned, the sentence imposed on the unaffected conviction on Count One is to be reinstated." *United States* v. *Sperling*, 560 F.2d 1050, 1060 (2 Cir. 1977) ("*Sperling II*").

Rather than retrying appellant on the three substantive counts, the government applied for and, on May 16, 1975, was granted an order of nolle prosequi as to those counts. The district court, on July 24, 1975, denied appellant's motion to vacate the nolle proseque order or, in the alternative, to dismiss the counts with prejudice. We dismissed the appeal from that order on January 26, 1976.

On July 10, 1978, appellant filed his first § 2255 petition, alleging that the absence of guilty verdicts on Counts VIII, IX and X rendered the continuing criminal enterprise conviction invalid. On August 31, 1978, Judge Pollack denied the petition in a brief opinion, stating that the continuing criminal enterprise conviction was supported by more than sufficient evidence. We affirmed by order. 595 F.2d 1209 (2 Cir. 1979) (mem.) ("*Sperling III*"). The Supreme Court denied certiorari, the petition to that Court having raised essentially the same issues which had been raised in and rejected by the two lower courts. 441 U.S. 947 (1979).

On October 13, 1981, Sperling filed his second § 2255 petition, alleging that, by affirming his conviction on Count II despite having vacated the convictions on Counts VIII, IX, and X, this Court had sanctioned his conviction of a crime although there was no proof that he had committed it. The claims raised in appellant's first and second § 2255 petitions are essentially identical. The only difference between the two is that appellant, who was represented by retained counsel on his first petition,

was represented by different retained counsel on his second petition. Appellant's counsel on the instant appeal conceded that he was making the same argument that was made on appeal from the denial of the first § 2255 petition, adding, "the argument was made by different counsel."

Judge Pollack, in a comprehensive, well reasoned opinion dated January 22, 1982, denied appellant's second § 2255 petition. From the order entered thereon, the instant appeal was taken.

II.

A court may give controlling weight to the determination of a prior § 2255 petition if: (1) the same ground presented in the subsequent petition was determined adversely to the petitioner on the prior petition; (2) the prior determination was on the merits; and (3) the ends of justice would not be served by reaching the merits of the subsequent petition. *Sanders* v. *United States*, 373 U.S. 1, 15 (1963).

We hold that the first requirement clearly is satisfied here. The same arguments were presented in appellant's prior § 2255 petition before the district court, this Court, and the Supreme Court. In each instance, the identical arguments made here were rejected.

We also hold that the second requirement is satisfied. The issue on the first petition, as on the instant one, was whether the judgment vacating the convictions on the substantive counts rendered the continuing criminal enterprise conviction constitutionally infirm. Judge Pollack, in denying the first petition, held that the conviction was not rendered infirm. We affirmed. The Supreme Court denied certiorari.

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This brings us to the third requirement. In deciding whether the ends of justice require reaching the merits, we must consider the repetitious nature of this petition, especially in view of the clear mandate of Congress in 28 U.S.C. § 2255, ¶ 5 (1976) that "[t]he sentencing court shall not be required to entertain a second or successive motion for similar relief on behalf of the same prisoner." Although there is no res judicata effect with respect to prior determinations of repetitious § 2255 petitions, a court should be less receptive to a claim when exactly the same claim previously was decided against a petitioner. For example, in *Alessi* v. *United States*, 653 F.2d 66, 69 (2 Cir. 1981), a case involving a repetitious § 2255 petition, we held that there was no reason why the ends of justice required reaching the merits of claims which so recently had been held to be without merit by the district court and by our Court. "Plainly there must be an end to litigating these claims several times decided by the district court and by us." *Id.* Similarly, the instant case involves a successive, repetitious petition without any new legal or factual claims being raised for setting aside the conviction. There must be an end to the instant litigation at some point. We hold, so far as this Court is concerned, that that point has now been reached.

Appellant contends that the merits should be reached because there has been an intervening change in the law, citing *Dunn* v. *United States*, 442 U.S. 100 (1979), which held that the court of appeals had erred in affirming a perjury conviction on grounds other than those charged. That case did not change the law. It merely emphasized the "firmly established" rule that a defendant has a right "to be heard on the specific charges of which he is accused." *Id.* at 106. We did not affirm Sperling's conviction on charges other than those on which he had been indicted and convicted.

Appellant further contends that the merits should be reached because both the direct appeal and the first § 2255 petition were incorrectly decided. He argues that, by vacating the convictions on the substantive counts, we removed the necessary predicate for conviction on the continuing criminal enterprise count. Although we need not discuss the merits because we believe that our earlier dispositions were correct, we believe it is appropriate briefly to explain more fully our holding in *Sperling I*.

The instant controversy is triggered by the district court's instruction at the 1973 trial that, to convict appellant on the § 848 count, the jury msut have been convinced beyond a reasonable doubt that he committed the offenses charged in the substantive counts. That charge was unnecessarily favorable to appellant. The law requires merely that there be evidence that the defendant committed three substantive offenses—even if not charged in separate indictments—to provide the predicate for a § 848 conviction. *See United States* v. *Sisca*, 503 F.2d 1337, 1345-46 (2 Cir.) (affirming a § 848 conviction although there were no indictments for substantive offenses), *cert. denied*, 419 U.S. 1008 (1974). Absent the linking of § 848 to the three substantive counts, there clearly was sufficient evidence to support the § 848 conviction even without the substantive counts.[1]

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1 We summarized this independent evidence in *Sperling I*:

"The record shows that Sperling was the operational kingpin of a highly organized, structured and on-going narcotics network. Testimony by Conforti, Cecile Mileto and Vance, as well as visual and electronic surveillance, clearly established that during the period from May 1, 1971 through April 13, 1973 Conforti, Louis Mileto, Goldstein, Schworak, Spada and many others were engaged in Sperling's narcotics enterprise directly under his supervision. There was evidence that on more than 26 occasions some or all of these individuals mixed heroin for Sperling. Each of these mixing sessions

Since the trial judge linked the § 848 count to the substantive counts, however, we were precluded in *Sperling I* from looking beyond the three substantive counts to hold that the jury convicted on the basis of evidence other than the substantive counts. *See Dunn* v. *United States, supra.* Rather, we affirmed the § 848 conviction *not* on evidence other than that in support of the substantive counts, but precisely on the evidence presented in support of those counts. This was appropriate because of the basis for our decision in vacating the convictions on the substantive counts.

We vacated the convictions on the substantive counts because the government failed to comply with the Jencks Act, 18 U.S.C. § 3500 (1976), which requires the government to turn over statements of a government witness relating to that witness' trial testimony. That was a decision not based on *constitutional* grounds, however, since the Jencks Act is a *statutory* requirement, not a constitutional one. *See United States* v. *Augenblick*, 393 U.S. 348, 356 (1969) ("our *Jencks* [v. *United States*, 353 U.S. 657 (1957)] decision and the Jencks Act were not cast in constitutional terms"); *see also Palermo* v. *United States*, 360 U.S. 343, 353 n.11 (1959).

If the failure to comply with the Jencks Act were a constitutional error—e.g. insufficiency of the evidence—the 1973 convictions would have been reversed outright and a new trial would have been barred on double jeopardy grounds. Here, however, vacating the convictions on the substantive counts and remanding the cases

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involved possession, diluting and distributing from a half kilo to three kilos of pure heroin." 506 F.2d at 1344.

We held that this evidence was more than sufficient to sustain appellant's conviction under the continuing criminal enterprise count. *Id.*

for a new trial was appropriate, *see, e.g., Goldberg* v. *United States*, 425 U.S. 94, 111-12 (1976), because there was no constitutional infirmity in those convictions.

Since the Jencks Act error was technical and statutory, not constitutional, it was not inconsistent for us to have vacated the convictions while still holding that the jury could have found beyond a reasonable doubt that appellant committed[2] those substantive offenses, thus providing the predicate for the § 848 conviction. In short, in vacating the convictions on the substantive counts on statutory grounds, we did not hold that it was constitutionally impermissible for the jury to have considered the Lipsky testimony in finding appellant guilty of the § 848 violation. Although the Jencks Act required that the testimony not be considered in ruling on the validity of the substantive offenses, it did not require that it be ignored with respect to the § 848 count. Thus, this was consistent with our statement in *Sperling I* that "[w]e find insufficient evidence, *other than Lipsky's testimony*, to sustain the convictions of any of the appellants for possession and distribution of cocaine and heroin as charged in substantive Counts Three through Ten . . . ." 506 F.2d at 1335 (emphasis added).[3]

Affirmed.

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2 We note that the district court instructed the jury that it must find beyond a reasonable doubt that appellant *committed* the substantive offenses, not that he was *convicted* of them. Thus the § 848 conviction was not rendered invalid by vacating the substantive convictions.

3 We find it neither necessary nor appropriate to comment on a post-argument communication addressed to us by appellant's counsel regarding an incident alleged to have occurred some two weeks after the argument in the instant case. We decide this case on the record before us.

VAN GRAAFEILAND, *Circuit Judge*, concurring:

It is a truism of the law that effective justice can only be achieved through the cooperative effort of those who seek it and those who dispense it. For this reason, litigants should not be permitted to play "fast and loose with the courts" by taking inconsistent positions in related proceedings. *Selected Risks Insurance Co. v. Kobelinski*, 421 F. Supp. 431, 434 (E.D. Pa. 1976) (quoting *Scarano v. Central R. Co.*, 203 F.2d 510, 513 (3d Cir. 1953)). Because I believe that this is what appellant is doing in the instant case, I write separately to indicate my accord with Judge Timbers, in whose well-reasoned opinion I fully concur.

Five years ago, appellant argued in this Court that his sentence on the conspiracy count should be vacated because the conspiracy was a lesser included offense in the continuing criminal enterprise and punishment under both counts constituted double jeopardy. *United States v. Sperling*, 560 F.2d 1050, 1053 (2d Cir. 1977). Appellant was fully familiar with the well-established doctrine, sometimes referred to as "judicial estoppel", which precludes a litigant from leading a court to find one way in one proceeding and then, because his interests have changed, leading the court to find another way in a subsequent proceeding. Indeed, in his brief on that appeal, appellant quoted the doctrine as it is set forth in *In re Johnson*, 518 F.2d 246, 252 (10th Cir.), *cert. denied*, 423 U.S. 893 (1975).

With complete awareness of where he was going, appellant argued that, because of his conviction on the continuing criminal enterprise count, his sentence on the conspiracy count must be vacated. Appellant assured the Court that "[i]f Sperling prevails he will still be saddled

with a sentence of life without parole." On that ground, and on that ground alone, the 1977 panel vacated appellant's sentence on the conspiracy count. 560 F.2d 1060. Having accomplished this, appellant is now back in our Court seeking to have his continuing criminal enterprise conviction vacated, thus knocking the props from under the argument which he presented successfully on his former appeal.

Moreover, the grounds upon which he bases his motion to vacate are inconsistent with his former arguments directed to the conspiracy count. Sperling's role in the conspiracy, which ran from May 1, 1971 to mid-April 1973, was described in our 1974 opinion as follows:

> Evidence concerning the activities of Sperling and the Sperling branch of the conspiracy was adduced primarily through the testimony of Joseph Conforti, a former member of the conspiracy. Conforti's testimony, corroborated by that of Cecile Mileto and Zelma Vance, established that 13 of the defendants and 2 of the co-conspirators named in the indictment were participants in the narcotics operations directed by Sperling. These witnesses described approximately 69 meetings, conversations, drugs sales or transfers beginning in early 1971 and continuing through April 1973 involving members of the Sperling group. As with the Pacelli branch of the conspiracy, each of Sperling's workers had a definite role in the conspiracy, including Goldstein and Schworak who delivered narcotics at Sperling's direction. Sperling supervised and directed the purchase, processing and sale of narcotics within his sphere of control.

(506) F.2d at 1330-31).

12 b

On his 1977 appeal, appellant argued that the conspiracy and the continuing criminal enterprise occupied the same time span, that the persons who allegedly acted in concert to commit multiple violations of the narcotics laws were also named as conspirators in the conspiracy count, and that the objects of the conspiracy and the continuing criminal enterprise were the same, *i.e.*, the violation of 18 U.S.C. § 841. Appellant stated in his brief:

> Thus the Court told the jury that, as to Count 1, Sperling commanded the services of *six particular persons,* and that, as to Count 2, he occupied a position of organizer, supervisor and manager of the *same six persons.* This effectively cemented the merger of Counts 1 and 2, as to Sperling, for punishment purposes upon conviction. (emphasis in original)

Today, however, appellant argues that he stands convicted of "criminal acts not charged at trial, and never found by a jury." I agree with Judge Timbers that this argument should be rejected on the merits. I also agree that there is no need to reach the merits. Whether we base our holding on a theory of estoppel, waiver, preclusion, or abuse of writ, we should not permit such piecemeal, inconsistent, and mutually exclusive attacks on a judgment of conviction as have occurred in this case.[1] For civil

[1] On June 3, 1977, I sent a memo to Judges Waterman and Motley, the panel majority in *United States v. Sperling,* 560 F.2d 1050, in which I said:

> If my crystal ball is working properly, I can see [Sperling] moving to dismiss the section 848 count as soon as the conspiracy count is gone.

It was that memo which prompted Judge Waterman to provide for reinstatement of the conspiracy sentence in the "unlikely event" that

cases applying one or more of these concepts, see *Davis v. Wakelee*, 156 U.S. 680, 689 (1895), *Roth v. McAllister Bros., Inc.*, 316 F.2d 143, 145 (2d Cir. 1963), *Hart v. Mutual Ben. Life Ins. Co.*, 166 F.2d 891, 894 (2d Cir. 1948), *Smith v. United States*, 466 F.2d 535, 536 (6th Cir. 1972), and *Gottesman v. General Motors Corp.*, 222 F. Supp. 342, 344 (S.D.N.Y. 1963), *cert. denied*, 379 U.S. 882 (1964). For criminal cases, see *United States v. Kramer*, 289 F.2d 909, 919-20 (2d Cir. 1961), *United States v. Gremillion*, 464 F.2d 901, 906-07 (5th Cir.), *cert. denied*, 409 U.S. 1085 (1972), and *Salta v. United States*, 44 F.2d 752, 753 (1st Cir. 1930). For habeas corpus cases, see *Johnson v. Massey*, 516 F.2d 1001, 1002 (5th Cir. 1975), *Bryans v. United States*, 374 F.2d 505, 506 (5th Cir. 1967), *cert. denied*, 387 U.S. 903 (1967), and *Crawford v. Cox*, 307 F. Supp. 732, 736 (W.D. Va. 1969).

KEARSE, *Circuit Judge*, dissenting:

With all due respect to the majority, I must dissent. I do so because I believe the claim made by Sperling in his present application under 28 U.S.C. § 2255 (1976), which he concedes is the same claim presented in his prior § 2255 application, is a valid constitutional claim that should be addressed on its merits and should be upheld.

Sperling's conviction on the continuing criminal enterprise count should be vacated. If this "unlikely event" were to occur, I wouldn't need a crystal ball to predict what would happen next. Sperling's counsel has already indicated that, if successful on this appeal, he will fight any attempt to reinstate Sperling's sentence on the conspiracy count.

A. *The Nature of Sperling's Claim*

Sperling was convicted on five counts of an indictment, to wit, of conspiring to violate the narcotics laws, in violation of 21 U.S.C. § 846 (1976) (count 1); of engaging in a continuing criminal enterprise, in violation of 21 U.S.C. § 848 (1976) (count 2); and of possessing heroin and cocaine with intent to distribute it, in violation of 21 U.S.C. §§ 841(a)(1) and (b)(1)(A) (1976) (counts 8, 9, and 10). As to count 2, the jury had been instructed that in order to find Sperling guilty of a continuing criminal enterprise under § 848, it must first find him guilty under counts 8, 9, and 10 of the indictment. (Tr. 4139, 4140.)

On appeal by Sperling and his codefendants, this Court reversed the convictions on counts 8, 9, and 10 on the ground that the government had failed to disclose, pursuant to the Jencks Act, 18 U.S.C. § 3500 (1976), a letter that might have been used to impeach the government's key witness, Barry Lipsky. *United States v. Sperling,* 506 F.2d 1323, 1332-35 (2d Cir. 1974) ("*Sperling I*"), *cert. denied,* 420 U.S. 962 (1975). We ruled that without the Lipsky testimony the evidence was insufficient for the jury to find Sperling or his codefendants guilty on counts 8, 9, and 10. *Id.* at 1335. We therefore remanded these counts for a new trial, with the Jencks Act material disclosed.[1] We upheld Sperling's conviction on count 2, however, stating that

> . . . Sperling's conviction of engaging in a continuing criminal enterprise involving hard narcotics was

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[1] The pertinent Lipsky letter had come to Sperling's attention between the time of trial and the appeal.

On remand, the government retried other defendants on some of the substantive counts but chose not to retry Sperling on counts 8-10.

based on evidence wholly independent of Lipsky's testimony.

Id.

Sperling's claim on his § 2255 application is that because the jury had been instructed that it must find him guilty on counts 8-10 in order to convict him on count 2, our setting aside the verdicts on counts 8-10 eliminated the mandated predicate for the jury's verdict of guilty on count 2. He claims that we denied him due process by looking to evidence of acts other than those charged in counts 8-10 as support for the conviction under count 2, because we thereby sustained his conviction on the basis of facts different from those on which the jury had been instructed to rest its verdict on count 2.

B. *The Merits of Sperling's Claim*

Notwithstanding the majority's interpretations of the action taken in *Sperling I,* Sperling's contention that that decision affirmed his conviction on count 2 on a basis as to which the jury had not been instructed appears to be accurate.

At the close of trial the jury was instructed that it could not find Sperling guilty of a continuing criminal enterprise under count 2 unless it found him guilty of the violations charged in counts 8-10. The court's instructions on count 2 were, in pertinent part, as follows:

> Before you can find the defendant Herbert Sperling guilty of the crime charged in the 2nd count of the indictment you must be convinced beyond a reasonable doubt that . . . :
>
> > . . . [h]e committed the offenses charged in counts 8, 9 and 10 of this indictment.

. . . .

. . . [Y]ou must be satisfied that Herbert Sperling is guilty under counts 8, 9 and 10

. . . .

(Tr. 4139, 4140.) Counts 8-10 alleged quite specific acts. Count 8 charged that Sperling and others distributed, and possessed with intent to distribute, one kilogram of cocaine in July 1971. Count 9 charged that Sperling and others distributed, and possessed with intent to distribute, two kilograms of heroin in November 1971. Count 10 charged that Sperling and others distributed, and possessed with intent to distribute, one kilogram of cocaine in December 1971.

Apparently the only evidence of these alleged acts of July, November, and December 1971 was the testimony of Lipsky, for in reversing the convictions on counts 8-10, after ruling Lipsky's testimony inadmissible without the disclosure of Jencks Act material, we stated as follows:

> We find insufficient evidence, other than Lipsky's testimony, to sustain the convictions of any of the appellants for possession and distribution of cocaine and heroin as charged in substantive Counts Three through Ten; indeed, we do not understand the government to claim that there is any evidence to corroborate Lipsky's testimony as to these counts.

506 F.2d at 1335. Logically, therefore, in light of the explicit instructions to the jury not to convict on count 2 unless it was satisfied beyond a reasonable doubt of Sperling's guilt on counts 8-10, it would seem that we would have set aside the conviction on count 2 as well. If the jury was not entitled to find Sperling guilty on counts 8-10, it was not entitled, under the court's instructions, to find him guilty on count 2.

Sperling I nevertheless upheld the conviction on count 2, resting the affirmance on evidence of violations other than the acts alleged in counts 8-10. Thus, we ascribed the count 2 conviction to "evidence wholly independent of Lipsky's testimony"—*i.e.*, evidence that we had just noted did not corroborate the Lipsky testimony as to counts 8-10.[2] *Id.* This other evidence supporting count 2, and the legal framework within which it was viewed in *Sperling I*, was described as follows:

> To establish a violation of § 848, it was incumbent upon the government to prove that Sperling occupied a position as organizer or a managerial or supervisory position with respect to a continuing narcotics trafficking operation in concert with five or more other persons, and that he received substantial income or resources from the operation.
>
> The record shows that Sperling was the operational kingpin of a highly organized, structured and on-going narcotics network. Testimony by Conforti, Cecile Mileto and Vance, as well as visual and electronic surveillance, clearly established that during the period from May 1, 1971 through April 13, 1973 Conforti, Louis Mileto, Goldstein, Schworak, Spada and many others were engaged in Sperling's narcotics enterprise directly under his supervision. There was evidence that on more than 26 occasions some or all of these individuals mixed heroin for Sperling. Each of these mixing sessions involved possession, diluting and distributing from a half kilo to three kilos of

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2 Neither Sperling nor the government had addressed the effect that a reversal of the convictions on counts 8-10 would have on the count 2 conviction in light of the jury charge on count 2.

pure heroin. Such evidence was more than sufficient to sustain his conviction under this count.

Id. at 1344 (footnote omitted).

Undoubtedly this evidence would have sufficed to sustain Sperling's conviction on count 2 if the jury had properly been given general instructions along the lines set forth in the first paragraph of the quoted passage.[3] The jury was not, however, given such general instructions. Rather, it was told that it could convict Sperling on count 2 only if it found beyond a reasonable doubt that he was guilty of having possessed and distributed one kilogram of cocaine in July, 1971 and in December 1971, and two kilograms of heroin in November 1971; and since this Court then sustained the count 2 conviction only on the basis of evidence that Sperling was kingpin of an ongoing narcotics conspiracy in which several individuals frequently mixed various amounts of heroin for Sperling between May 1971 and April 13, 1973—evidence that we had ruled insufficient to prove Sperling's specifically alleged possession or distribution in July, November, or December 1971—I am forced to conclude that this Court affirmed Sperling's count 2 conviction on a basis other than that on which the jury had been instructed to rest its decision.[4]

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3 *But see* note 5 *infra* and accompanying text.

4 It is not entirely clear to me whether the majority construes *Sperling I* as having relied on the Lipsky evidence on counts 8-10 to support the conviction on count 2, or as having affirmed count 2 on the basis of the non-Lipsky evidence. *Compare, e.g.*, opinion of Timbers, J., *ante* at 6 ("[W]e affirmed the § 848 conviction *not* on evidence other than that in support of the substantive counts, but precisely on the evidence presented in support of those counts" (emphasis in original)), *with id.* at ___ n.1 (quoting *Sperling I*'s recitation of evidence of acts other than those charged in counts 8-10 and conceding that "[w]e held that *this* evidence was more than sufficient to sustain appellant's conviction under the continuing criminal enterprise count" (emphasis added)).

The majority's palliative for this fundamental defect is to state that the trial court's instructions to the jury with respect to count 2 were more favorable to Sperling than was required by law. Whether or not the premise is correct,[5] it cannot alter the instructions given, and in light of those instructions we were not entitled to affirm on the basis of acts not charged in counts 8-10, for it is established that a defendant has a due process right to have an affirmance of his conviction based strictly on a consid-

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With all due deference to the views of Judge Timbers as the author of *Sperling I*, the *Sperling I* opinion itself leaves little doubt that the affirmance on count 2 was based only on evidence other than Lipsky's testimony. *See* 506 F.2d at 1335, 1344.

[5] These instructions, which in fact had been requested by the government, reflected the specificity of count 2 of the indictment, which expressly linked the charged violation of § 848 to the violations alleged in counts 8-10. Count 2 charged as follows:

COUNT TWO

The Grand Jury further charges:

From on or about the 1st day of May, 1971, and continuously thereafter up to and including the date of the filing of this indictment, in the Southern District of New York, HERBERT SPERLING, the defendant, unlawfully, wilfully, intentionally and knowingly did engage in a continuing criminal enterprise *in that he* unlawfully, wilfully, intentionally and knowingly did violate Title 21, United States Code, Sections 841(a)(1) and 841(b)(1)(A) *as alleged in Counts Eight, Nine and Ten of this indictment which are incorporated by reference herein*, which violations were a part of a continuing series of violations of said statutes undertaken by the defendant in concert with at least five other persons with respect to whom the defendant occupied a position of organizer, supervisor and manager and from which continuing series of violations the defendant obtained substantial income and resources.

(Title 21, United States Code, Section 848)

(Emphasis added.) In light of the specificity with which count 2 incorporated the particular charges of counts 8-10, it is not clear that a general instruction, or one referring to different acts at other times and places—which are nowhere mentioned in the indictment—would not have been "an informal but impermissible amendment of the indictment." *United States v. Knuckles*, 581 F.2d 305, 310 (2d Cir.), *cert. denied*, 439 U.S. 986 (1978); *see also id.* at 311-12.

eration of the premises on which the jury was instructed to base its verdict. *Dunn v. United States*, 442 U.S. 100 (1979).

In *Dunn*, the defendant had been charged with making inconsistent statements in grand jury proceedings or proceedings ancillary thereto, in violation of 18 U.S.C. § 1623 (1976). The government introduced evidence that Dunn had given testimony before the grand jury, that he thereafter, in September 1976, made a statement inconsistent with his grand jury testimony, and that in October 1976 he gave testimony reiterating his September statement. The indictment charged that Dunn's grand jury testimony was inconsistent with his September statement, and the case was submitted to the jury on this theory. 442 U.S. at 106 & n.4. On appeal from the conviction, the court of appeals ruled that the September statement should not have been considered since it was not made in an "ancillary" proceeding, but that as the October statement had been made in such a proceeding, the conviction would be upheld. In an 8-0 decision, the Supreme Court reversed, stating that

> while there was no variance between the indictment and the proof at trial, *there was a discrepancy between the basis on which the jury rendered its verdict and that on which the Court of Appeals sustained petitioner's conviction.* Whereas the jury was instructed to rest its decision on Dunn's September statement, the Tenth Circuit predicated its affirmance on petitioner's October testimony. The Government concedes that this ruling was erroneous. . . . We agree.
>
> To uphold a conviction on a charge that was neither alleged in an indictment nor presented to a

> jury at trial offends the most basic notions of due process. Few constitutional principles are more firmly established than a defendant's right to be heard on the specific charges of which he is accused. *See Eaton v. Tulsa*, 415 U.S. 697, 698-699 (1974) (*per curiam*); *Garner v. Louisiana*, 368 U.S. 157, 163-164 (1961); *Cole v. Arkansas*, 333 U.S. 196, 201 (1948); *De Jonge v. Oregon*, 299 U.S. 353, 362 (1937). There is, to be sure, no glaring distinction between the Government's theory at trial and the Tenth Circuit's analysis on appeal. The jury might well have reached the same verdict had the prosecution built its case on petitioner's October 21 testimony adopting his September 30 statement rather than on the September statement itself. *But the offense was not so defined, and appellate courts are not free to revise the basis on which a defendant is convicted simply because the same result would likely obtain on retrial.*

Id. at 106-07 (emphasis added).

The principle of *Dunn* is no less applicable to Sperling. Count 2, *see* note 5 *supra*, charged Sperling with having violated § 848 "in that he" engaged in the specific acts alleged in counts 8, 9, and 10, which were incorporated by reference in count 2; these were alleged to be part of a continuing series of violations none of which was even minimally detailed. Consistent with count 2, the trial court's charge instructed the jury that it must find Sperling guilty of counts 8, 9, and 10 in order to convict him on count 2. I find the parallel between this case and *Dunn* inescapable. Notwithstanding the ruling in *United States v. Sisca*, 503 F.2d 1337, 1345-46 (2d Cir.), *cert. denied*, 419 U.S. 1008 (1974), that a defendant may be convicted under § 848 even if *no* substantive offenses have been

alleged as separate counts of the indictment, *Dunn* holds that due process does not permit the appellate court to substitute uncharged offenses for the charged violations that cannot be sustained. Thus, when the jury has been instructed that it may conclude "A" only if it has found "B," we simply may not affirm on the supposition that the outcome would have been the same if the jury had been told that it could conclude "A" if it had found "C."

In sum, I disagree with the majority's view of the merits of Sperling's claim. As I read *Sperling I*, Sperling's contention that his count 2 conviction was affirmed on the basis of facts other than those on which the jury had been instructed to render its verdict is factually correct. And his contention that such an affirmance denied him due process is legally sound.

C. *Prior Treatment of Sperling's Claim*

Nor do I share the majority's view that on the present § 2255 petition we and the district court are free, in the interests of achieving an end to litigation, not even to consider the merits of Sperling's claim because that claim had been rejected in the first § 2255 proceeding. Section 2255 allows a prisoner in federal custody to move at any time to have the court that sentenced him vacate, set aside, or correct his sentence on the ground that the sentence was imposed in violation of the Constitution or laws of the United States. While successive motions on the same grounds are not favored,[6] the Supreme Court has stated that "[c]onventional notions of finality of litigation have no place where life or liberty is at stake

[6] Section 2255 provides that "[t]he sentencing court shall not be required to entertain a second or successive motion for similar relief on behalf of the same prisoner."

and infringement of constitutional rights is alleged," *Sanders v. United States*, 373 U.S. 1, 8 (1963), and has formulated the following basic rule for determining whether a repetitive motion may be denied without consideration of its merits:

> Controlling weight may be given to denial of a prior application for federal habeas corpus or § 2255 relief only if (1) the same ground presented in the subsequent application was determined adversely to the applicant on the prior application, (2) the prior determination was on the merits, and (3) the ends of justice would not be served by reaching the merits of the subsequent application.

Id. at 15 (footnote omitted). In the present case it appears to me that none of the three *Sanders* conditions is met.

Part of the first *Sanders* condition is the requirement that the petitions' common "ground," which *Sanders* defined as "simply a sufficient legal basis for granting the relief sought by the applicant," *id.* at 16, must previously have been determined. There are several indicia that the district court's decision on the first § 2255 petition did not determine the claim asserted by Sperling, *i.e.*, that he was denied due process by the affirmance on a different factual basis than that on which the jury had been instructed to rest its verdict.

First, although on that original petition the district court's decision, which is set out in the margin,[7] began by

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[7] The district court's ruling on Sperling's first application stated as follows:

> Sperling contends that the absence of a "guilty" verdict on three of the substantive counts in the indictment (8, 9, 10) removes the basis for his conviction for engaging in a continuing Criminal Enterprise under 21 U.S.C. 848 (Count 2) because the charge of the jury required it to find that he had *committed the offenses* set forth in those counts. Counts 8, 9 and 10 were ultimately nolle prosequid

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recognizing that Sperling's claim was based on the fact that the jury had been instructed not to convict on count

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after guilty verdicts thereon were set aside and those counts ordered retried due to the government's failure to produce a certain letter affecting a witness' credibility, viz., violation of a Jencks Act requirement, 18 U.S.C. § 3500. The appellate court in ordering the retrial of those counts expressly found nonetheless that

> "We also hold that Sperling's conviction on Count Two was not affected by the absence of the Lipsky-Feffer letter" [the omitted Jencks Act disclosure] 506 F.2d at 1337 n.18.

The appellate court did not reverse and dismiss Counts 8, 9 and 10 as it would have done if the evidence of Sperling's commission of the offenses had been lacking. *Burks v. United States*, 46 U.S.L.W. 4632 (Sup. Ct. June 14, 1978). That is, the proof of Sperling's commission of the offenses charged under Counts 8, 9 and 10 was amply shown in the record and Count 2 was therefore properly considered by the jury and resolved in favor of the government pursuant to the charge of the Trial Judge on the issue of the existence of a criminal enterprise under 21 U.S.C. § 848. The Court of Appeals expressly found that the verdict under Count Two (the continuing enterprise) was supported by "more than sufficient evidence" 506 F.2d at 1344. Thus no constitutionally required evidence was lacking for the Sperling conviction under Count Two. The non-disclosure of Jencks Act material which tripped the conviction on Counts 8, 9 and 10 did not constitutionally taint conviction under Count Two—the failure to apply such a statute raises no issue of constitutional dimension.

There was no fundamental defect herein which inherently resulted in any miscarriage of justice and the matter now conjured up on Sperling's behalf is merely a challenge bottomed on non-constitutional error at best. Such a challenge does not ground collateral review under § 2255. *Kaufman v. United States*, 394 U.S. 217, 223 (1969); *Hill v. United States*, 368 U.S. 424, 428 (1962); *Sunal v. Large*, 332 U.S. 174 (1947). "The writ of habeas corpus and its federal counterpart, 28 U.S.C. § 2255, will not be allowed to do service for an appeal", with respect to non-constitutional error. *Stone v. Powell*, 428 U.S. 465, 477, n.10 (1976). Moreover, the present challenge is too late. Sperling never challenged his conviction heretofore under Count Two based on the non-disclosure of the Jencks Act material. The time to do so was on his direct appeal or on petition for rehearing after affirmance of the conviction on Count Two. Other opportunities have intervened since then without a word suggesting the present challenge. Even if we assume that these opportunities following the appeal would have been considered too late, the present claim asserted still later certainly precludes

2 unless it was satisfied that Sperling was guilty on counts 8, 9, and 10, the decision never mentioned the other essential ingredient of Sperling's claim, *i.e.*, that our Court affirmed the count 2 conviction on the basis of evidence of acts other than those charged in counts 8-10. Rather, the district court seemed to assume that *Sperling I* affirmed the count 2 conviction in reliance on the Lipsky evidence on counts 8-10. Proceeding on this assumption, the court construed Sperling's claim as (a) a simple attack on the sufficiency of the evidence to support a conviction on count 2, and (b) a Jencks Act claim that the Lipsky evidence should not have been considered on count 2.[8] These are the only matters the district court addressed, as it concluded that "no constitutionally required evidence was lacking" for conviction on count 2, and that the government's Jencks Act violation was not sufficiently serious to warrant relief under § 2255. Memorandum decision dated August 31, 1978, at 1.

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review under § 2255. Without any doubt, there has been no good "cause" for the previous omission to raise the present claim.

In sum, the Court of Appeals affirmed Sperling's conviction on Count Two on "more than sufficient" evidence and its decision that the Jencks Act error did not taint any Counts other than 8, 9 and 10 [not Two] gives no ground arising under or protected by the Constitution.

Petition Denied.

Memorandum decision dated August 31, 1978 (emphasis in original; footnote omitted).

[8] See the portion of the court's decision, note 7 *supra*, immediately following its citation of *Burks v. United States*. The court's premise that *Sperling I* relied on the Lipsky testimony in sustaining the count 2 conviction would explain the court's insistent characterization, in both the prior and present § 2255 proceedings, of Sperling's due process claim as one based simply on the Jencks Act. *Sperling I* did of course state that the conviction on count 2 was not affected by the Jencks Act violation; but this was quite plainly because only Lipsky material had been wrongfully withheld and *Sperling I* relied on *non*-Lipsky evidence to support the conviction on that count.

The court's failure to recognize the actual nature of Sperling's claim is further revealed by its comment that a § 2255 petition cannot be used as a substitute for appeal from the conviction. This observation was inapposite because Sperling's § 2255 claim is that he was denied due process not by the trial court but by the appellate court.

Finally, the court concluded that Sperling's claim was "merely a challenge bottomed on non-constitutional error at best." *Id.* at 2. Such a characterization is surely incompatible with any recognition of Sperling's claim as he framed it.[9]

The majority concludes that the first *Sanders* condition is met, *i.e.*, that Sperling's due process ground was determined on his first petition, simply because the ground was presented and the petition was denied. I do not believe the first *Sanders* requirement means so little. A determination of a ground—*i.e.*, a legal basis for relief, *Sanders v. United States, supra,* 373 U.S. at 16—that is not the one relied on by the prisoner cannot fairly be viewed as a determination of the prisoner's ground. Just as we should resolve in the prisoner's favor all doubts as to whether two grounds are the same or different, *id.*, so should we infer, when the district court has apparently misperceived the gist of the prisoner's ground, that the unrecognized ground has not been determined.

Even if the nonresponsive rejection of Sperling's first § 2255 petition be deemed a "determination" of his due process ground, the second *Sanders* condition was not satisfied. That requirement, *i.e.*, that the claim have been

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[9] Our affirmance of the district court's denial of the first § 2255 petition added nothing to the analysis or determination of the lower court. Our order, 595 F.2d 1209 (1979), simply read "AFFIRMED," without explication, and hardly evinced a determination of Sperling's actual contention.

decided "on the merits," *id.* at 15, means not only that the decision must not have rested on a procedural basis, but also that it must have adjudicated "the merits of the ground presented," *id.* at 16. Rejection of a § 2255 motion on the merits of a ground other than that argued by the prisoner hardly satisfies this condition. The majority views the prior rejection of Sperling's § 2255 petition as a determination on the merits of his due process ground because it characterizes "[t]he issue" presented as "whether the judgment vacating the convictions on the substantive counts rendered the continuing criminal enterprise conviction constitutionally infirm." Opinion of Timbers, J., *ante* at 5. It concludes that the ground of Sperling's first petition was rejected on its merits because "Judge Pollack, in denying the first petition, held that the conviction was not rendered infirm." *Id.* This framing of "the issue" is so broad as to encompass any of a number of possible claims, and Judge Pollack did indeed reject two such possible claims; but they were not the due process claim on which Sperling relied.

Finally, if the first two *Sanders* conditions be viewed so technically that the district court's prior ruling on the claims as it erroneously perceived them is deemed an adjudication of the merits of the ground advanced by Sperling, I have no doubt that the interests of justice require a consideration now of the merits of the due process ground as Sperling has in fact presented it.[10] First,

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10 I must note my disagreement with the implication in the majority opinion that the repetitious nature of a claim should incline the court toward the conclusion that the ends of justice do not require a review of the merits of the claim. The majority states as follows:

> In deciding whether the ends of justice require reaching the merits, we must consider the repetitious nature of this petition . . . . [A] court should be less receptive to a claim when exactly the same claim previously was decided against a petitioner.

elementary principles of fairness demand that Sperling's due process claim not be ignored and that the court not be permitted to refuse to reach its merits simply on the basis that the court has rejected a previous petition, apparently without understanding the ground on which the petition was based. More importantly, even if the court had accurately perceived Sperling's claim, it would hardly further the interests of justice to immunize a decision that is plainly incorrect. I agree with the Ninth and Eleventh Circuits that " '[t]he ends of justice are not served by refusal to consider the merits of the second application when the denial of the first rested on a court's plain errors of law.' " *Bass v. Wainwright*, 675 F.2d 1204, 1207 (11th Cir. 1982) (quoting *Cancino v. Craven*, 467 F.2d 1243, 1246 (9th Cir. 1972)).

In summary, I believe that the action taken on Sperling's first § 2255 petition did not determine the ground he advanced and that the ends of justice require that the merits of his claim be dealt with in the present proceeding.[11]

Opinion of Timbers, J., *ante* at 5. The ends-of-justice test is a catchall requirement that comes into play under the *Sanders* formulation *only* if the repeated claim *has* already been adversely decided. *See Sanders v. United States*, *supra*, 373 U.S. at 15, 16-17. To say, then, that the ends of justice are not compelling when the repeated claim has been decided is to eliminate *Sanders*'s ends-of-justice requirement entirely.

11 I disagree with Judge Van Graafeiland's view that Sperling's claim should be rejected on grounds of judicial estoppel. In *United States v. Sperling*, 560 F.2d 1050 (2d Cir. 1977) ("*Sperling II*"), the position advanced by Sperling was not inconsistent with that taken here and clearly was not viewed by the *Sperling II* majority as foreclosing a future attack on the conviction of Sperling on count 2.

In *Sperling II*, Sperling (who there appeared *pro se*) did not contend that his conviction on count 2 was valid in order to avoid his conviction on count 1. Rather, he contended simply that, having been convicted on both counts, one of which charged a lesser included offense within the other, he could not be punished for both. Thus, his

D. *The District Court's Decision on the Present Petition*

I do not view Judge Pollack's decision on Sperling's present petition, which is reported at 530 F. Supp. 672 (S.D.N.Y. 1982), as having refused to reach the merits of Sperling's claim. The basis of his decision rejecting the present application is twofold. While concluding that the petition should be denied on the ground that it was entirely repetitious, the court also proceeded to discuss the merits of various claims, arguably including the one pressed by Sperling. For the most part, however, it ap-

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main brief stated that "[t]his is a double jeopardy case involving the issue of multiple *punishment*, as contrasted to prosecution or conviction," (Sperling brief in *Sperling II* at 10; emphasis in original), and his reply brief reiterated this as follows:

> *ISSUE INVOLVED IS THE SENTENCE, NOT THE CONVICTION*
>
> The government erroneously states at page 3 *et seq* of its brief that Sperling is attacking his "conviction" on Count 1. Actually, Sperling in his main brief went to great pains to show that on this appeal, he is raising only the issue of multiple "punishment", as contrasted to prosecution or conviction (Br. 10); that a continuing course of criminal conduct may not be "punished" cumulatively (Br. 11) . . . .

(Sperling reply brief in *Sperling II*.) The *Sperling II* majority correctly understood that Sperling attacked only the pyramiding of punishment, as it stated that Sperling challenged the "sentencing on both counts, rather than on only one or the other." *Sperling II*, 560 F.2d at 1053; *id.* at 1060 n.13. The fact that Sperling did not challenge the validity of his convictions in *Sperling II* should not bar his present challenge.

In agreeing with Sperling's contention that the double jeopardy clause required the vacation of his sentence on either count 1 or count 2, the *Sperling II* Court did not disturb the conviction on count 1, and obviously the majority did not believe that a later challenge to the conviction on count 2 would be foreclosed. The majority stated as follows:

> We, of course, leave undisturbed Sperling's sentence and fine on Count Two and in the unlikely event that sometime in the future his conviction on Count Two shall be overturned, the sentence imposed on the unaffected conviction on Count One is to be reinstated.

Id. at 1060.

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pears that the district court again addressed claims other than the one advanced by Sperling.

First the court characterized Sperling's claim as follows:

> Petitioner on this application questions whether the Constitution requires that, in order to sustain a charge under 21 U.S.C. § 848 (Count Two herein), the defendant must be convicted of each of the crimes charged in other counts of the indictment laid under 21 U.S.C. §§ 812 and 841.

Id. at 673. This framing of the issue ignores the nature and cardinal role of the jury charge in the present case, and completely disregards the contention that the error consisted in the action of the appellate court. It plainly is not the claim Sperling has framed.

Thereafter, following a description of Sperling's conviction and his direct appeal, the district court reiterated its 1978 analysis of Sperling's claim:

> As the government correctly observes, Sperling continues to argue today, as he did in 1978, that the decision of the Court of Appeals reversing Counts Eight to Ten on statutory grounds, *but refusing to reverse Count Two on the same statutory ground,* somehow resulted in two constitutional errors: lack of sufficient evidence as to a necessary element of Count Two and lack of trial by jury on that count.

Id. at 677 (emphasis added). The court stated that it had ruled on this claim, noting as follows:

> The Court of Appeals' rejection of the claim of violation of the Jencks Act in respect of the conviction on Count Two and the finding by the Court of Appeals that there was more than sufficient evidence

> to sustain that conviction were cited by this Court in its denial of the earlier § 2255 petition and that decision and its affirmance were on the merits; the decision left the petitioner without a constitutional claim and without a statutory claim. As this Court wrote on the 1978 petition, Sperling "raises no issue of constitutional dimension" and the petitions amount to nothing more than an invalid statutory claim in disguise.

Id. The district court's emphasis on the Jencks Act as the sole foundation for Sperling's claim reflects the court's continued interpretation of *Sperling I* as having used the Lipsky testimony in order to uphold the count 2 conviction. *See* note 8 *supra.*

Nonetheless, after having described Sperling's claim as simply a "statutory claim in disguise," 530 F. Supp. at 677, the court proceeded to discuss Sperling's petition as claiming a "lack of trial by jury on" count 2, *id.*—a characterization that is far closer to Sperling's actual claim than any previously mentioned by the court. In rejecting this proposition, the court stated as follows:

> Sperling's second argument, that he was deprived of a trial by jury, is equally specious since all the evidence was in fact submitted to the jury which found—in a verdict not infected by constitutional error—that Sperling committed the predicate acts charged in Counts Eight to Ten as part of his supervision of a narcotics enterprise. This case is not at all like *Dunn v. United States, supra,* where the Court of Appeals had affirmed a conviction on a basis not argued nor proved (much less proved beyond a reasonable doubt) at trial, a ruling which the government conceded was erroneous. Here the proof given

> to the jury under Count Two remained constitutionally sound both before and after the Second Circuit affirmed the conviction on that count. The holding of the Court of Appeals that there was more than sufficient evidence to support the verdict on Count Two independent of Lipsky's testimony does not therefore mean that petitioner stands convicted on grounds neither considered nor decided by a jury.

Id. at 678. Although I regard the court's reasoning as both factually and legally flawed, it seems to me that given the court's characterization of Sperling's claim as one relating to the role of the jury, together with the explicit reference to *Dunn*, this decision should be construed as a present determination of the merits of Sperling's claim.

E. *Reviewing the Present Decision on the Merits*

My views of the merits of Sperling's claim are set forth in detail in Part B of this dissent. As to the action taken on Sperling's direct appeal, *Sperling I* (a) found the non-Lipsky evidence insufficient to support guilty verdicts on counts 8-10, 506 F.2d at 1335; (b) noted the lack of any evidence corroborating Lipsky as to counts 8-10, *id.*; (c) stated that the conviction on count 2 was based on evidence wholly independent of Lipsky's testimony, *id.*; (d) recounted that independent evidence with no mention whatever of any of the acts charged in counts 8-10, *id.* at 1344; and (e) sustained the count 2 conviction on the basis of the independent evidence just recounted, *id.* at 1344-45. I therefore regard the district court's premise that *Sperling I* sustained the count 2 conviction in reliance on the Lipsky evidence on counts 8-10 as clearly erroneous.

Given an accurate recognition of the basis on which *Sperling I* upheld the count 2 conviction and of the fact that this basis differed from that on which the jury had been instructed to rest its verdict, I regard the district court's ruling that *Dunn v. United States* is inapplicable as a plain error of law.

Accordingly, I would reverse the order denying Sperling's petition and would remand the matter to the district court for an appropriate correction of Sperling's sentence.

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT
United States Courthouse
Foley Square
New York 10007

A. DAniel Fusaro
Clerk

Herbert Sperling v. U.S.A.
Docket No. 82-2022

August Term, 1981
Decided October 22, 1982

Page 5376, 4 lines up from bottom of page - delete "affirm." and insert "affirm.**" in place thereof.

Page 5376, bottom of page - insert "**Since I agree with Judge Van Graafeiland's

concurring opinion, pages 5385-5388, infra, and he agrees with mine, the two opinions together constitute the majority view of this court."

Page 5380, line 8 - delete "January 22, 1982, denied" and insert "January 22, 1982, 530 F. Supp. 672, denied" in place thereof.

Page 5381, line 12 - delete "69 (2" and insert "69" in place thereof.

Page 5381, line 13 -- delete "Cir. 1981)," and insert "(2 Cir. 1981)," in place thereof.

Page 5385, line 1 - delete "Circuit Judge, concurring:" and insert "Circuit Judge, joined by Timbers, Circuit Judge, concurring:" in place thereof.

Page 5386, bottom line - delete "(506) F.2d at 1330-31." and insert "506 F.2d at . . . ." in place thereof.

A. Daniel Fusaro,
Clerk

ADF/hjd

UNITED STATES DISTRICT COURT

SOUTHER DISTRICT OF NEW YORK

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UNITED STATES OF AMERICA :

v. :

HERBERT SPERLING, :

Petitioner. :

----------x

73 CR. 441 (M)

81 CIV. 6378 (MP)

Milton Pollack, District Judge.

The deficiency of this specious application under 28 U.S.C. § 2255 makes it a leaden abuse of the Writ and an imposition on the Court.

Herbert Sperling petitions this Court for a second time under 28 U.S.C. § 2255 to vacate his conviction by a jury -- rendered over eight years ago -- for organizing and supervising a continuing criminal narcotics enterprise. His petition asserts that he was unconstitutionally deprived of his Fifth Amendment right to due process and his Sixth Amendment right to a trial by jury. Sperling unsuccessfully raised these exact claims through another lawyer three years ago in his earlier § 2255 petition before this Court; he asserted them in the Court of Appeals for the Second Circuit on his appeal to that Court from the denial of § 2255 relief and raised them once again in

his unsuccessful petition for certiorari thereon to the Supreme Court of the United States. Petitioner's claims remain devoid of merit and substance in the present § 2255 petition.

SUMMARY

Petitioner on this application questions whether the Constitution requires that, in order to sustain a charge under 21 U.S.C. § 848 (Count Two herein), the defendant must be convicted of each of the crimes charged in other counts of the indictment laid under 21 U.S.C. §§ 812 and 841. The short answer is in the negative.

Section 848 reads in pertinent part:

> (a) (1) Any person who engages in a continuing criminal enterprise shall be sentenced to a term of imprisonment....
>
> * * *
>
> (b) For purposes of subsection (a) of this section, a person is engaged in a continuing criminal enterprise if -
>
> (1) he violates any provision

of this subchapter or subchapter II of this chapter the punishment for which is a felony, and

(2) such violation is a a part of a continuing series of violations of this subchapter or subchapter II of this chapter -

(A) which are undertaken by such person in concert with five or more other persons with respect to whom such person occupies a position of organizer, a supervisory position, or any other position of management, and

(B) from which such person obtains substantial income or resources.

Seriatim, the plain response to each of the contentions presented on this petition follow.

1. The record amply shows that petitioner's claims contrived herein have heretofore always been understood by the courts and have been squarely addresed and litigated successfully in favor of the government; the claims were ripe, and postured by Sperling's previous lawyers, fully litigated by him, and successively found wanting in merit. In his sworn statement presenting this petition,

prepared by his latest attorney, Sperling acknowledges that he raised his "constitutional" argument to three courts in 1978.

2. A § 848 conviction does not require or rest on a separate grand jury charge of or conviction only on the acts which could give rise to separate and additional indictments under § 841. A separate conviction thereon is not essential to sustain a § 848 conviction if other violations were proved. Much more was proved at the trial by the 18 witnesses who testified relating to Sperling than the specific acts mentioned in Counts Eight, Nine and Ten. Indeed, Sperling was convicted of narcotics conspiracy, Count One. 21 U.S.C. § 846. That conviction satisfied the definitional requirements of § 848(b) of engagement in a continuing criminal enterprise.

3. The Court's instructions did not hinge conviction under Count Two on convictions under Counts Eight, Nine and Ten. The word "conviction" is nowhere used or implicit in the instructions on the essentials to be proved to sustain Count Two. No exception was taken by the defendant to the charge that "commission" of the entreprenurial narcotics acts was the essential element to be found (not "conviction" thereon).

4. The Court of Appeals, in affirming the conviction on Count Two under § 848 had addressed and its affirmance was on the grounds litigated, viz., that Sperling engaged in the sort of enterprise condemned in that statute, that the Jencks Act taint of Counts Eight, Nine and Ten had not affected the acts charged1/ or the convictions under either Counts One or Two and that Count Two was proved by "more than sufficient evidence." United States v. Sperling, 506 F.2d 1323, 1344 (2d Cir. 1974.2/

1/ The indictment on Count Two incorporated the acts mentioned in Counts Eight, Nine and Ten.

2/ "The record shows that Sperling was the operational kingpin of a highly organized, structured and on-going narcotics network. Testimony by Conforti, Cecile Mileto and Vance, as well as visual and electronic surveillance, clearly established that during the period from May 1, 1971 through April 13, 1973 Conforti, Louis Mileto, Goldstein, Schworak, Spada and many others were engaged in Sperling's narcotics enterprise directly under his supervision. There was evidence that on more than 26 occasions some or all of these individuals mixed heroin for Sperling. Each of these mixing sessions involved possession, diluting and distributing from a half kilo to three kilos of pure heroin. Such evidence was more than sufficient to sustain his conviction under this count." United States v. Sperling, 506 F.2d 1323, 1344 (2d Cir. 1974).

Sperling's Conviction and the Proceedings on Direct Appeal

Herbert Sperling and several co-defendants were convicted by a jury of several narcotics offenses on July 12, 1973, after almost four weeks of trial. The evidence showed Sperling to be the kingpin in a vast continuing heroin and cocaine distribution enterprise. Sperling was also shown to be the primary supplier of heroin for this enterprise.

Sperling had been charged on Count One of the indictment with conspiracy with his co-defendants to violate the federal narcotics laws in contravention of 21 U.S.C. § 846, on Count Two with organizing and supervising a continuing criminal narcotics enterprise in violation of 21 U.S.C. § 848, and on Counts Eight, Nine and Ten under 21 U.S.C. § 841 with intent to distribute, along with others, cocaine and heroin on the occasions mentioned. The

jury found Sperling and ten other defendants guilty on all counts as charged. Sperling was sentenced to life imprisonment and fined $100,000 on Count Two, and to thirty years imprisonment plus six years special parole on Counts One, Eight, Nine and Ten, and fined $50,000 on each of these counts.

On October 10, 1974, the Court of Appeals affirmed Sperling's convictions on Counts One and Two but reversed and remanded for a new trial as to him on Counts Eight to Ten because of the government's violation with respect to those counts of its statutory obligations under the Jencks Act, 18 U.S.C. § 3500. United States v. Sperling, 506 F.2d 1323 (2d Cir. 1974), cert. denied 420 U.S. 962 (1975). The government had failed to provide the defendants with a letter (the Lipsky-Feffer letter) written to a prosecutor by one of the government's witnesses, Barry Lipsky,

which might have been used to impeach that witness. Since Lipsky testified particularly regarding the offenses charged in Counts Three to Ten, the Court of Appeals reversed as to all defendants convicted of these counts. However, the Court specifically rejected defendant's Jencks Act challenge to Count Two, stating that "[w]e also hold that Sperling's conviction on Count Two was not affected by the absence of the Lipsky-Feffer letter." Id. at 1337, n.18.

Counts Eight, Nine and Ten were not retried; an entry of nolle prosequi was made on May 16, 1975. This left the prosecution "just as though no such count had ever been inserted in the indictment." Dealy v. United States, 153 U.S. 539, 542 (1893). Petitioner moved to vacate the entry of nolle prosequi of these counts or alternatively to amend the original entry to read: "Dismissed with Prejudice." The

motion to vacate or so amend the entry was denied and Sperling's appeal therefrom was dismissed by the Court of Appeals.

In a footnote to its affirmance of the conviction on Counts One and Two, the Court of Appeals (Id. 1335, n.14) had stated that "In view of the concurrent sentences on the conspiracy count (Count One) imposed on those appallants whose convictions on the substantive counts we reverse while sustaining these convictions on the conspiracy count (Sperling as to Count Eight, Nine and Ten ***), we remand the cases of these appellants for reconsideration on the conspiracy count...."

On March 26, 1976 Sperling filed a motion in this Court "for reconsideration of sentencing" on Count One (the conspiracy count) and also for reduction of sentence. On May 17, 1976 an order was entered that the sentence theretofore imposed on Count

One would be adhered to and Sperling was then resentenced accordingly. United States v. Sperling, 413 F. Supp. 847 (S.D.N.Y. 1976). Sperling appealed.

On June 13, 1977, the Court of Appeals vacated the resentence on Count One as imposed for a lesser offense included under Count Two and remanded the action to the District Court for further proceedings in accordance with the opinion of the Court of Appeals. United States v. Sperling, 560 F.2d 1050, 1060 (2d Cir. 1977). The Court noted that:

> [W]e vacate appellant Sperling's sentence on Count One, the conspiracy count, but we vacate only the sentence, for his conviction on Count One remains unaffected.

The government petitioned for a rehearing of the Court's opinion and decision filed June 13, 1977; the petition was granted and an order was entered that:

> We, of course, leave undisturbed Sperling's sentence and fine on Count Two and in the unlikely event that sometime in the future his conviction on Count Two shall be

overturned, the sentence imposed on the unaffected conviction on Count One is to be reinstated. Id.

The First § 2255 Petition

On July 10, 1978, petitioner filed a motion pursuant to 28 U.S.C. § 2255 to vacate his conviction on Count Two, posing the identical arguments petitioner again presses here. His petition stated:

> "Herbert Sperling's Constitutional Right to A Trial By Jury Was Violated When His Judgment Of Conviction For Violating 21 U.S.C. 848 Was Affirmed On Appeal Upon A Charge Of Which He Was Never Tried;" and "Herbert Sperling's Constitutional Right To Due Process Of Law Was Violated When His Judgment Of Conviction for Engaging In a Continuing Criminal Enterprise In Violation of 21 U.S.C. 848 Was Affirmed By the Court Of Appeals On A Record That Discloses No Proof Of One Of The Essential Elements Of The Crime Charged."

This Court denied the § 2255 petition, pointing out that the Court of Appeals, in affirming the Count Two conviction, had expressly found that conviction

to be supported by "more than sufficient" evidence. United States v. Sperling, 78 Civ. 3099 (S.D.N.Y. August 31, 1978), quoting United States v. Sperling, 506 F.2d at 1344. This Court held that the finding by the Court of Appeals that the Count Two conviction was not tainted by violations of the Jencks Act did not deprive Sperling of any constitutional rights.

The Court of Appeals affirmed the denial of the § 2255 petition. Sperling v. United States, 595 F.2d 1209 (2d Cir. 1979).

Sperling appealed to the Supreme Court for a writ of certiorari, again raising therein the identical issues presented here. Specifically, Sperling's petition presented the following as the constitutional questions inherent in his case:

> (1) Was defendant denied due process by affirmance of his conviction on basis of charge for which he was not tried or found guilty? (2) Was defendant denied due process by Government's failure to prove his guilt beyond reasonable doubt on one element of the crime charged? (3) Was defendant denied due process by indictment's failure to fairly inform him of charges against him?
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> 47 U.S.L.W. 3732-33 (May 8, 1979).

The Supreme Court denied the petition. Sperling v. United States, 441 U.S. 947 (1979).

The Present § 2255 Petition

Successive § 2255 petitions raising the same questions previously considered in collateral proceedings or even simply on direct appeal are regularly denied summarily by the courts. See, e.g.,

Maxwell v. United States, 439 F.2d 135 (2d Cir.), cert. denied 402 U.S. 1010 (1971) (Per Curiam), where a five year delay between the initial mistrial and the subsequent trial was claimed to have violated the Sixth Amendment right to a speedy trial. Petitioners had previously raised the speedy trial issue on appeal and were denied relief. Though petitioners in their § 2255 petition argued that a later Supreme Court case raised doubts about the constitutionality of a denial of the speedy trial claim on direct appeal, the District Court denied the § 2255 petition. The Court of Appeals affirmed, holding that "[h]aving passed upon petitioner's claim before, on the appeal from their convictions which we affirmed in 1967, we see no reason to decide the question again." Id. at 136. In United States v. Romano, 516 F.2d 768 (2d Cir.), cert. denied 423 U.S. 994 (1975), the Court of Appeals upheld the

denial of a second § 2255 petition on the ground, inter alia, that the claim was successive even though the petitioner alleged new facts on this claim.

In the instant case Sperling attempts to avoid the weight of the previous denials by three courts of the exact claims presented here by arguing, inter alia, under Sanders v. United States, 373 U.S. 1 (1963) that the prior § 2255 motion was not determined on its merits and that intervening changes in the law favor his position so that a rehearing on the petition would "serve the ends of justice." The rule in Sanders is that controlling weight may be given to the denial of a previous application for § 2255 relief if: (1) the same ground presented in the subsequent application was determined adversely to the applicant on the prior application; (2) that determination was on the merits, and;

(3) the ends of justice would not be served by reaching the merits of the subsequent application.

Sperling does not argue that he is presenting his claims for the first time in this petition, but argues that the "lengthy and fragmented" nature of the litigation prevented the reviewing courts from clearly seeing the constitutional claims in their entirety. It is hard to understand how petitioner makes such an argument when he, with the aid of counsel, brought all the issues together in his first § 2255 petition. That petition was brought after the vacation of the convictions under Counts Eight, Nine and Ten, the nolle prosequi of those charges, and the vacating of the sentence on Count One. The case today is in the exact same posture as it was three years ago.

Petitioner's claim that his previous motion to vacate his conviction was not

decided on the merits because the District Court allegedly did not address petitioner's constitutional arguments is casuistic. The Court of Appeals' rejection of the claim of violation of the Jencks Act in respect of the conviction on Count Two and the finding by the Court of Appeals that there was more than sufficient evidence to sustain that conviction were cited by this Court in its denial of the earlier § 2255 petition and that decision and its affirmance were on the merits; the decision left the petitioner without a constitutional claim and without a statutory claim. As this Court wrote on the 1978 petition, Sperling "raises no issue of constitutional dimension" and the petitions amount to nothing more than an invalid statutory claim in disguise.

The "intervening" change in the law that petitioner adverts to is represented by him to be Dunn v. United States, 442

U.S. 100 (1979), which did not involve a change in the law at all. In that case the Supreme Court reversed a perjury conviction because the Court of Appeals erroneously affirmed the conviction on defendant's October 21st testimony rather than his September 30th testimony which was the issue presented to the jury. The government had never argued that the October 21st testimony should be the basis for a perjury conviction and admitted in the appeal to the Supreme Court that the Court of Appeals had been in error. Id. at 106. In reversing, the Supreme Court noted that it was not establishing any new principles of law, stating that "[f]ew constitutional principles are more firmly established than a defendant's right to be heard on the specific charges of which he is accused." Id. Thus Dunn clearly is not a case involving change in the law.

Nonetheless, in view of petitioner's persistence in arguing that a grave injustice has been done, it may be worthwhile to demonstrate, once again, why petitioner's claims of constitutional violations are without substance.

As the government correctly observes, Sperling continues to argue today, as he did in 1978, that the decision of the Court of Appeals reversing Counts Eight to Ten on statutory ground, somehow resulted in two constitutional errors: lack of sufficient evidence as to a necessary element of Count Two and lack of trial by jury on that count.

The first argument cannot be sustained unless this Court is prepared to overturn the Second Circuit's explicit holding that the jury's verdict on Count Two was a valid one and was based on "more than sufficient" evidence as a constitutional matter. Sperling continues to

refuse to comprehend that the Jencks Act and constitutional standards are completely different, and that the Court of Appeals' reversal of Courts Eight to Ten on statutory grounds is irrelevant to the constitutional Adequacy of the proof of the acts charged in Counts Eight to Ten or Count Two. The Court of Appeals was not constitutionally compelled to apply the Jencks Act to all counts, as it is simply a statutory protection. As the Court of Appeals for the Fifth Circuit stated in Calley v. Callaway, 519 F.2d 184, 224 (5th Cir. 1975), cert. denied 425 U.S. 911 (1976):

> [T]he Supreme Court has noted that the Jencks decision was "not required by the Constitution," and that the decision was not cast in constitutional terms. The decision in Jencks v. United States and the Jencks Act itself do not set forth constitutional requirements. Rather "[t]hey state rules of evidence governing trials before federal tribunals; and we have never extended their principles to state criminal trials." (citations ommited) (emphasis in original)

See also United States v. Dioguardi, 428 F.2d 1033, 1038 (2d Cir.), cert. denied 400 U.S. 825 (1970) ("[R]ather than being the Magna Carta of the right to production, the Jencks Act is a restriction on it in certain respects.")

Sperling's second argument, that he was deprived of a trial by jury, is equally specious since all the evidence was in fact submitted to the jury which found -- in a verdict not infected by constitutional error -- that Sperling committed the predicated acts charged in Counts Eight to Ten as part of his supervision of a narcotics enterprise. This case is not at all like Dunn v. United States, supra, where the Court of Appeals had affirmed a conviction on a basis not argued nor proved (much less proved beyond a reasonable doubt) at trial, a ruling which the government conceded was erroneous. Here the proof given to the jury under Count Two remained constitu-

tionally sound both before and after the Second Circuit affirmed the conviction on that count. The holding of the Court of Appeals that there was more than sufficient evidence to support the verdict on Count Two independent of Lipsky's testimony does not therefore mean that petitioner stands convicted on grounds neither considered nor decided by a jury.

Petitioner seeks to obscure the fact that the jury's verdict rested on adequate and constitutionally admissible proof by arguing that through this Court's charge to the jury, the existence of convictions on Counts Eight to Ten was prerequisite to a conviction on Count Two and that the charge somehow became the "law of the case." This argument mistakenly is based on a charge not given. In charging the jury the Court directed it to consider whether offensive acts of intending narcotic distribution had

been "committed," not whether a "conviction" had been established.3/ In fact, in setting out each of the five elements for a conviction under § 848, (Count Two), (i.e. the charge that is at issue), the Court clearly explained:

> Before you can find the defendant Herbert Sperling guilty of the crime charged in the 2nd count of the indictment you must be convinced beyond a reasonable doubt the government has proved the following elements:
>
> First, that the defendant Herbert Sperling committed the offenses charged in counts 8, 9 and 10 of this indictment. Those counts, as you will hear, charge

3/ The latter charge would have in fact been incorrect since, as the government notes, there is no requirement under § 848 that these underlying acts be charged as separate crimes at all, let alone that judgments of conviction under Counts Eight to Ten be entered. The government must only offer proof under § 848 that the acts are "committed." See, e.g., United States v. Sisca, 503 F.2d 1337 (2d Cir.), cert. denied 419 U.S. 1008 (1974), where a defendant was convicted under § 848 even though he was not even indicted for substantive acts of narcotics distribution. Petitioner's argument that Sisca is inapposite because the defendant was convicted of underlying offenses misses the

Specific substantitive offenses in July, November and December, 1971, by Herbert Sperling and Vincent Pacelli, and in the December offense also by Juan Serrano.

Second, that the offenses charged in counts 8, 9 and 10 of this indictment are part of a continuing series of violations of the defendant Herbert Sperling of the Prevention and Control Act of 1970.

Third, that the defendant Herbert Sperling undertook to commit such offenses in concert with five or more other persons, either named or unnamed in the indictment.

Fourth, that the defendant Sperling occupied a position of organizer, a supervisory position or other position of management with respect to such five or more other persons.

The fifth and last essential element is: proof beyond a reasonable doubt that from the continuing series of violations, if such you so find, the defendant Herbert Sperling obtained substantial income or resources. (Emphasis supplied)

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point that such underlying offenses were not ones of distributing narcotics but rather conspiracy to distribute (such as was charged here in Count One, a conviction that remains valid), and use of a communication facility in furtherance of the conspiracy; United States v. Papa, 533 F.2d 815, 823 (2d Cir.), cert. denied 429 U.S. 961 (1976).

Thus the charge to the jury did not say that convictions on Counts Eight through Ten were necessary to support a conviction on Count Two -- only that it was essential to find that the defendants had commited the acts mentioned in these later counts.4/ The jury did so find, and the Court of Appeals

4/ Subsequently, in summarizing the specific charge on element one of Count Two, the Court told the jury that it must believe Sperling guilty under Counts Eight, Nine and Ten, -- meaning guilty of the acts charged in those counts. Nowhere did the Court use the word "conviction". Beyond reasonable doubt the predicate acts grounding Count Two were committed. Further, even if use of the word "guilty" might have been confusing in an isolated charge, here it followed a detailed instruction which explained that the jury had to find the defendant committed the predicate offenses. It is a well-established rule that "a single instruction to a jury may not be judged in artificial isolation, but must be viewed in the context of the overall charge ....Moreover, in reviewing jury instructions, our task is also to view the charge itself as part of the whole trial." United States v. Park, 421 U.S. 658, 675 (1974). See also United States v. Birnbaum, 373 F.2d 250, 257 (2d Cir.), cert. denied 389 U.S. 837 (1967).

expressly held that the Jencks Act claim did not void the jury's findings with respect to Count Two. As noted previously, the Court of Appeals stated "[w]e also hold that Sperling's conviction on Count Two was not affected by the absence of the Lipsky-Feffer letter." 506 F.2d at 1337, n.18.

Clearly petitioner has not suffered deprivations of his Fifth and Sixth Amendment rights. His arguments to the contrary are formalistic and based upon false premises. They cannot obscure the fact that Sperling's conviction on Count Two rests fully on competent, constitutionally admissible evidence considered and found decisive by a jury, nor that this petition raises the same exact claims alleged in Sperling's first § 2255 petition, three years ago, the merits of which were passed upon and unequivocally found wanting by this Court.

Other minor forays by the briefs on the petition have been considered and found unworthy of response.

The ends of justice would certainly not be served by holding a hearing on this petition.

Accordingly, this second § 2255 petition must be and is in all respects denied.

SO ORDERED.

January 22, 1982

Milton Pollack
U.S. District Judge

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const. Amend. V:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due proces of law; nor shall private property be taken for public use, without just compensation.

U.S. Const. Amend. VI:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

18 U.S.C. § 3500:

(a) In any criminal prosecution brought by the United States, no statement or report in the possession of the United States which was made by a Government witness or prospective Government

witness (other than the defendant) shall be the subject of subpena, discovery, or inspection until said witness has testified on direct examination in the trial of the case.

(b) After a witness called by the United States has testified on direct examination, the court shall, on motion of the defendant, order the United States to produce any statement (as hereinafter defined) of the witness in the possession of the United States which relates to the subject matter as to which the witness has testified. If the entire contents of any such statement relate to the subject matter of the testimony of the witness, the court shall order it to be delivered directly to the defendant for his examination and use.

(c) If the United States claims that any statement ordered to be produced under this section contains matter which does not relate to the subject matter of

the testimony of the witness, the court shall order the United States to deliver such statement for the inspection of the court in camera. Upon such delivery the court shall excise the portions of such statement which do not relate to the subject matter of the testimony of the witness. With such material excised, the court shall then direct delivery of such statement to the defendant for his use. If, pursuant to such procedure, any portion of such statement is withheld from the defendant and the defendant objects to such withholding, and the trial is continued to an adjudication of the guilt of the defendant, the entire text of such statement shall be preserved by the United States and, in the event the defendant appeals, shall be made available to the appellate court for the purpose of determining the correctnessof the ruling of the trial judge. Whenever any statement is delivered

to a defendant pursuant to this section the court in its discretion, upon application of said defendant, may recess proceedings in the trial for such time as it may determine to be reasonably required for the examination of such statement by said defendant and his preparation for its use in the trial.

(d) If the United States elects not to comply with an order of the court under subsection (b) or (c) hereof to deliver to the defendant any such statement, or such portion thereof as the court may direct, the court shall strike from the record the testimony of the witness, and the trial shall proceed unless the court in its discretion shall determine that the interests of justice require that a mistrial be declared.

(e) The term "statement" as used in subsections (b), (c), and (d) of this

section in relation to any witness called by the United States, means__

(1) a written statement made by said witness and signed or otherwise adopted or approved by him;

(2) a stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement made by said witness and recorded contemporaneously with the making of such oral statement; or

(3) a statement, however taken or recorded, or a transcription thereof, if any, made by said witness to a grand jury.

21 U.S.C. § 841 (a) (1):

(a) Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally__

(1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance; ...

21 U.S.C. § 841 (b) (1) (A):

(b) Except as otherwise provided in section 845 of this title, any person who violates subsection (a) of this section shall be sentenced as follows:
(1) (A) In the case of a controlled substance in schedule I or II which is a narcotic drug, such person shall be sentenced to a term of imprisonment of not more than 15 years, a fine of not more than $25,000, or both. If any person commits such a violation after one or more prior convictions of him for an offense punishable under this paragraph, or for a felony under any other provision of this subchapter or subchapter II of this chapter or other law of the United States relating

to narcotic drugs, marihuana, or depressant or stimulant substances, have become final, such person shall be sentenced to a term of imprisonment of not more than 30 years, a fine of not more than $50,000 or both. Any sentence imposing a term of imprisonment under this paragraph shall, in the absence of such a prior conviction, impose a special parole term of at least 3 years in addition to such term of imprisonment and shall, if there was such a prior conviction, impose a special parole term of at least 6 years in addition to such term of imprisonment.

21 U.S.C. § 846:

Any person who attempts or conspires to commit any offense defined in this subchapter is punshable by imprisonment or fine or both which may not exceed the maximum punishment prescribed for the

offense, the commission of which was the object of the attempt or conspiracy.

21 U.S.C. § 848:

(a) (1) Any person who engages in a continuing criminal enterprise shall be sentenced to a term of imprisonment which may not be less than 10 years and which may be up to life imprisonment, to a fine or not more than $100,000 and to the forfeiture prescribed in paragraph (2); except that if any person engages in such activity after one or more prior convictions of him under this section have become final, he shall be sentenced to a term of imprisonment which may not be less than 20 years and which may be up to life imprisonment, to a fine or not more than $200,000, and to the forfeiture prescribed in paragraph (2).

(2) Any person who is convicted under paragraph (1) of engaging in a

continuing criminal enterprise shall forfeit to the United States--

(A) the profits obtained by him in such enterprise, and

(B) any of his interest in, claim against, or property or contractual rights of any kind affording a source of influence over, such enterprise.

(b) For purposes of subsection (a) of this section, a person is engaged in a continuing criminal enterprise if--

(1) he violates any provision of this subchapter or subchapter II of this chapter the punishement for which is a felony, and

(2) such violation is a part of a continuing series of violations of this subchapter of subchapter II of this chapter--

(A) which are undertaken by such person in concert with five or more other persons with respect

to whom such person occupies a position of organizer, a super-organizer, a supervisory position, or any other position of management, and

(B) from which such person obtains substantial income or resources.

(c) In the case of any sentence imposed under this section, imposition or execution of such sentence shall not be suspended, probation shall not be granted, and section 4202 of Title 18 and the Act of July 15, 1932 (D.C. Code, secs. 24-203 to 24-207), shall not apply.

(d) The district courts of the United States (including courts in the territories or possessions of the United States having jurisdiction under subsection (a) of this section) shall have jurisdiction to enter such restraining orders or prohibitions, or to take such other actions, including the

acceptance of satisfactory performance bonds, in connection with any property or other interest subject to forfeiture under this section, as they shall deem proper.

28 U.S.C. § 2255:

A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United Sttes, or that the court was without jurisdiction to impose such sentence, or that the sentence ws in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which impsed the sentence to vacate, set aside or correct the sentence.

A motion for such relief may be made at any time.

Unless the motion and the files and records of the case conclusively show that

the prisoner is entitled to no relief, the court shall cause notice thereof to be served upon the United States attorney grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto. If the court finds that the judgment was rendered without jurisdiction, or that the sentence imposed was not authorized by law or otherwise open to collateral attack, or that there has been such a denial or infringement of the constitutional rights of the prisoner as to render the judment vulnerable to collateral attack, the court shall vacate and set the judgment aside and shall discharge the prisoner or resentence him or grant a new trial or correct the sentence as may appear appropriate.

A court may entertain and determine such motion without requiring the production of the prisoner at the hearing.

The sentencing court shall not be required to entertain a second or successive motion for similar relief on behalf of the same prisoner.

An appeal may be taken to the court of apeals from the order entered on the motion as from a final judment on application for a writ of habeas corpus.

An application for a writ of habeas corpus in behalf of a prisoner who is authorized to apply for relief by motion pursuant to this section, shall not be entertained if it appears that the applicant has failed to apply for relief, by motion, to the court which sentenced him, or that such court has denied him relief, unless it also appears that the remedy by motion is inadequate or ineffective to test the legality of his detention.